



# Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples

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Final Report

June 2015

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## Chair's foreword

For the last 114 years, Australia's founding document, the Constitution, has been silent on Aboriginal and Torres Strait Islander peoples.

Excluded from voting, and from participating in the convention debates which led to the drafting of the Constitution, the voices of Aboriginal and Torres Strait Islander peoples were silenced by the framers of the Constitution.

While there is no constitutional recognition for Aboriginal and Torres Strait Islander peoples, that silence will continue. The absence of Aboriginal and Torres Strait Islander peoples from the Constitution makes silent and renders invisible the world's oldest continuing culture.

European contact began in the 1600s when ships from Europe first explored the coastlines of the lands and waters that would become known as Australia.

In 1770, Captain James Cook made landfall at Botany Bay. On 26 January 1788, Captain Arthur Phillip established a settlement at Sydney Cove made up of those who travelled as part of the First Fleet.

Over the next century, new colonies were founded and borders were drawn up across a continent that had been home to hundreds of Aboriginal nations for tens of thousands of years.

When the Constitution was drafted, the exclusion of Aboriginal and Torres Strait Islander peoples was unremarkable for the time, as Aboriginal and Torres Strait Islander peoples were not considered citizens and had minimal rights and protections.

However, the continued constitutional silence maintained by this exclusion *is* remarkable.

That our Constitution allows a state to ban a race from voting *is* remarkable.

That in our Constitution there are more references to lighthouses than to the first peoples of this nation *is* remarkable.

That constitutional recognition has not occurred already *is* remarkable.

The Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples has engaged the Australian community on constitutional recognition by conducting fifteen public hearings, speaking with constitutional law experts and holding community forums. At all times, the committee has sought to hear the aspirations of Aboriginal and Torres Strait Islander peoples. The committee strongly believes that in order to achieve constitutional recognition, the support of Aboriginal and Torres Strait Islander peoples is of critical importance. Without this support, the imposed silence of the past will continue into the future.

The committee has heard that it is time to remedy the injustice of exclusion and recognise in our founding document the significant contribution of Aboriginal and Torres Strait Islander peoples to a modern Australia.

The committee heard that in order to achieve this, the mere removal of racist sections of the Constitution would not be enough and that much more is needed. The committee heard that Aboriginal and Torres Strait Islander peoples will accept nothing less than a protection from racial discrimination in the Constitution.

Since the time of Captain Cook's first landfall, Aboriginal and Torres Strait Islander peoples have suffered from continuous dislocation, discrimination and disadvantage.

The committee heard of the serious and pressing issues faced by Aboriginal and Torres Strait Islander peoples in everyday life and heard of the endemic racial discrimination faced by Aboriginal and Torres Strait Islander peoples.

The committee acknowledges that recognition in the Constitution will not end racism in Australia, nor will it be a solution to the serious problems faced by Aboriginal and Torres Strait Islander peoples. However, constitutional recognition will be a vital step towards reconciliation and give a voice to Aboriginal and Torres Strait Islander peoples in a Constitution better aligned with a modern Australia.

By protecting Aboriginal and Torres Strait Islander peoples from discrimination on the basis of race, Australia will be better placed to offer its first peoples a future in which their historical mistreatment is not repeated.

This final report of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples recommends that a referendum be held on the matter of recognising Aboriginal and Torres Strait Islander peoples in the Constitution.

I commend this report of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples to the Prime Minister and the Australian Parliament.

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## Executive summary

The committee recommends that a referendum be held on the matter of recognising Aboriginal and Torres Strait Islander peoples in the Australian Constitution, and that it be held at a time when it has the highest chance of success.

**The committee recommends that a referendum be held on the matter of recognising Aboriginal and Torres Strait Islander peoples in the Australian Constitution** (paragraph 9.32).

**The committee recommends that the referendum on constitutional recognition be held when it has the highest chance of success** (paragraph 2.40).

The committee has considered mechanisms for engagement on the topic of constitutional recognition, and recommends that conventions consisting of Aboriginal and Torres Strait Islander delegates as well as delegates from the broader Australian community be held to build support for a referendum and to engage a wide cross-section of the community (paragraphs 8.49-8.50).

The committee puts forward three options which it considers would meet the dual objectives of achieving constitutional recognition and protecting Aboriginal and Torres Strait Islander peoples from racial discrimination (paragraphs 4.88-4.94).

The committee recommends that section 25 of the Constitution be repealed, and that section 51 (xxvi) be replaced, with the retention of a persons power so that the Commonwealth government may legislate for Aboriginal and Torres Strait Islander peoples as per the 1967 referendum result (paragraphs 3.19-3.20).

During the inquiry, the committee formed the view that amending the *Human Rights (Parliamentary Scrutiny) Act 2011* to include scrutiny of the United Nations Declaration on the Rights of Indigenous Peoples would act as an enhancement to the existing parliamentary scrutiny framework (paragraph 6.18).

The committee has achieved its objective of building a secure strong multi-partisan parliamentary consensus around the timing, specific content and wording of referendum proposals for Indigenous constitutional recognition.

The committee recommends that each House of Parliament set aside a full day of sitting to debate concurrently the recommendations of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, with a view to achieving near-unanimous support for and build momentum towards a referendum to recognise Aboriginal and Torres Strait Islander peoples (paragraph 2.32).

As a mechanism to focus engagement on this important debate, the committee recommends that a parliamentary process be established to oversight progress towards a successful referendum (paragraph 9.33).



# Recommendations

## Recommendation 1

2.32 The committee recommends that each House of Parliament set aside a full day of sitting to debate concurrently the recommendations of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, with a view to achieving near-unanimous support for and build momentum towards a referendum to recognise Aboriginal and Torres Strait Islander peoples.

## Recommendation 2

2.40 The committee recommends that the referendum on constitutional recognition be held when it has the highest chance of success.

## Recommendation 3

3.19 The committee recommends that section 25 of the Constitution be repealed.

## Recommendation 4

3.20 The committee recommends the repeal of section 51(xxvi) and the retention of a persons power so that the Commonwealth government may legislate for Aboriginal and Torres Strait Islander peoples as per the 1967 referendum result.

## Recommendation 5

4.88 The committee recommends that the three options, which would retain the persons power, set out as proposed new sections 60A, 80A and 51A & 116A, be considered for referendum.

4.89 The first option the committee recommends for consideration is its amended proposed new section 51A, and proposed new section 116A, reported as option 1 in the committee's Progress Report:

### **51A Recognition of Aboriginal and Torres Strait Islander Peoples**

**Recognising** that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

**Acknowledging** the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

**Respecting** the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.

### **116A Prohibition of racial discrimination**

(1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.

(2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group;

4.90 The committee considers that this proposal:

- is legally and technically sound;
- retains a persons power as per the 1967 referendum result;
- contains a special measures provision;
- limits the constitutional capacity of the Commonwealth, states and territories to discriminate;
- offers a protection for all Australians;
- is a broad option;
- had the overwhelming support of Aboriginal and Torres Strait Islander peoples and non-Aboriginal and Torres Strait Islander peoples during the inquiry; and
- accords with the recommendation of the Expert Panel.

4.91 The second option was proposed by Mr Henry Burmester AO QC, Professor Megan Davis and Mr Glenn Ferguson after their consultation process:

## **CHAPTER IIIA**

### **Aboriginal and Torres Strait Islander Peoples**

#### **Section 80A**

(1) **Recognising** that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

**Acknowledging** the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

**Respecting** the continuing cultures and heritage of Aboriginal and Torres Strait Islander peoples;

**Acknowledging** that Aboriginal and Torres Strait Islander languages are the original Australian languages and a part of our national heritage;

the Parliament shall, subject to this Constitution, have power to make laws with respect to Aboriginal and Torres Strait Islander peoples, but so as not to discriminate against them.

(2) This section provides the sole power for the Commonwealth to make special laws for Aboriginal and Torres Strait Islander peoples.

4.92 The committee considers that this proposal:

- is legally and technically sound;
- retains a persons power as per the 1967 referendum result;
- is clear in meaning;
- limits the capacity of the Commonwealth only with regard to discrimination, so states and territories are not affected by constitutional change;
- is a narrow option; and
- offers constitutional protection from racial discrimination for Aboriginal and Torres Strait Islander peoples.

4.93 The third option which would retain the persons power is the proposal from the Public Law and Policy Research Unit at the University of Adelaide:

#### **60A Recognition of Aboriginal and Torres Strait Islander Peoples**

**Recognising** that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

**Acknowledging** the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

**Respecting** the continuing cultures and heritage of Aboriginal and Torres Strait Islander peoples;

**Acknowledging** that Aboriginal and Torres Strait Islander languages are the original Australian languages and a part of our national heritage;

(1) The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.

(2) A law of the Commonwealth, a State or a Territory must not discriminate adversely against Aboriginal and Torres Strait Islander peoples.

4.94 The committee considers that this proposal:

- is legally and technically sound;
- retains a persons power as per the 1967 referendum result;
- is clear in meaning;
- is both a narrow and a broad option;
- limits the 'adverse discrimination' provision to Aboriginal and Torres Strait Islander peoples; and
- limits the capacity of the Commonwealth, states and territories constitutionally to discriminate.

### **Recommendation 6**

6.18 The committee recommends that the *Human Rights (Parliamentary Scrutiny) Act 2011* be amended to include the United Nations Declaration on the Rights of Indigenous Peoples in the list of international instruments which comprise the definition of human rights under the Act.

### **Recommendation 7**

8.49 The committee recommends that the government hold constitutional conventions as a mechanism for building support for a referendum and engaging a broad cross-section of the community while focussing the debate.

### **Recommendation 8**

8.50 The committee further recommends that conventions made up of Aboriginal and Torres Strait Islander delegates be held, with a certain number of those delegates then selected to participate in national conventions.

### **Recommendation 9**

9.32 The committee recommends that a referendum be held on the matter of recognising Aboriginal and Torres Strait Islander peoples in the Australian Constitution.

### **Recommendation 10**

9.33 The committee recommends that a parliamentary process be established to oversight progress towards a successful referendum.



# Chapter 1

## Introduction

1.1 This is the final report of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples. The committee has previously tabled two reports, the Interim Report in July 2014 and the Progress Report in October 2014.

1.2 On 2 December 2013, the Parliament agreed that a Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples be appointed. The resolution establishing the committee states that:

(1) a Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples be appointed to inquire into and report on steps that can be taken to progress towards a successful referendum on Indigenous constitutional recognition, and in conducting the inquiry, the committee:

(a) work to build a secure strong multi-partisan parliamentary consensus around the timing, specific content and wording of referendum proposals for Indigenous constitutional recognition; and

(b) consider:

(i) the creation of an advisory group whose membership includes representatives of Aboriginal and Torres Strait Islander people to assist the work of the committee;

(ii) the recommendations of the Expert Panel on Constitutional Recognition of Indigenous Australians; and

(iii) mechanisms to build further engagement and support for the constitutional recognition of Aboriginal and Torres Strait Islander peoples across all sectors of the community, and taking into account and complementing the existing work being undertaken by Recognise;

(2) the committee present to Parliament an interim report on or before 30 September 2014 and its final report on or before 30 June 2015.<sup>1</sup>

1.3 The committee determined not to establish an advisory group as the committee took the view that wider consultation with Aboriginal and Torres Strait Islander leaders, communities and organisations would provide broader input into the committee's work.

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1 The Hon Mr Christopher Pyne, Leader of the House, Minister for Education, *House of Representatives Hansard*, 21 November 2013, p. 969.

1.4 The committee confirms its view, expressed in previous reports, that removing the ability of the Commonwealth to make laws that discriminate adversely against Aboriginal and Torres Strait Islander peoples is an issue of vital importance, not only to Aboriginal and Torres Strait Islander peoples but to the wider Australian community. As noted in its Progress Report, the committee has heard compelling evidence from Aboriginal and Torres Strait Islander peoples on the racial discrimination they have suffered and the deep desire for a constitutional protection against discrimination.

### **Principles of the Expert Panel**

1.5 In its 2012 report, the Expert Panel adopted four principles during the formation of their recommendations. The Expert Panel took the view that the four principles must be met in order for a successful referendum to occur. The principles set out that constitutional recognition must:

- contribute to a more unified and reconciled nation;
- be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples;
- be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and
- be technically and legally sound.<sup>2</sup>

1.6 The committee, in all its work, has sought to implement these principles.

1.7 In its Interim Report tabled in July 2014, the committee set out the possible options for constitutional change and discussed issues raised. The Interim Report agreed with the view of the Expert Panel that any referendum proposal would need to meet the following conditions:

- recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia;
- preserve the Commonwealth's power to make laws with respect to Aboriginal and Torres Strait Islander peoples; and
- in making laws under such a power, prevent the Commonwealth from discriminating against Aboriginal and Torres Strait Islander peoples.<sup>3</sup>

1.8 In this report, the committee reiterates its support for these three conditions, and considers that a referendum to recognise Aboriginal and Torres Strait Islander peoples has the greatest chance of success if these conditions are met.

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2 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. xi.

3 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Interim Report*, July 2014, p. 29.

## Progress Report

1.9 In its Progress Report tabled in October 2014, based on evidence from further public hearings and submissions, the committee put forward three structural options for the Parliament to consider:

***OPTION 1 – New section 51A with a broad prohibition of racial discrimination incorporating the Expert Panel's section 116A amendment***

**51A Recognition of Aboriginal and Torres Strait Islander Peoples**

**Recognising** that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

**Acknowledging** the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

**Respecting** the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.

**116A Prohibition of racial discrimination**

The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.

Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group;

***OPTION 2 – New section 51A with a limited prohibition of discrimination by the Commonwealth against Aboriginal and Torres Strait Islander peoples***

**51A Recognition of Aboriginal and Torres Strait Islander peoples**

**Recognising** that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

**Acknowledging** the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

**Respecting** the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

(1) The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait

Islander peoples, but not so as to discriminate adversely against them.

- (2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of Aboriginal and Torres Strait Islander peoples.

***OPTION 3 – Redraft section 51(xxvi) to allow the Commonwealth Parliament to make laws with respect to Aboriginal and Torres Strait Islander peoples with the option of enacting an Act of Recognition***

**51 Legislative Powers of the Parliament**

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(xxvi) Aboriginal and Torres Strait Islander peoples.<sup>4</sup>

1.10 In the Progress Report, the committee also recommended the following:

- **section 25**  
that section 25 of the Constitution be repealed;
- **section 127A**  
that the Expert Panel's proposed new section 127A, on language, not be inserted;
- **section 51(xxvi)**  
that section 51(xxvi) of the Constitution be amended to remove the reference to race; and
- **concurrent debate**  
that each House of Parliament set aside a full day of sittings to debate concurrently the recommendations of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples.

1.11 The committee reaffirms its recommendation that proposed new section 127A, on language, not be inserted.<sup>5</sup>

1.12 In preparing this final report, the committee has continued to meet with a range of stakeholders, advisers and witnesses. The committee held 15 hearings and

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4 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Progress Report*, October 2014, pp ix-x.

5 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Progress Report*, October 2014, p. 3. The committee reported its findings in its Interim Report, Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Interim Report, July 2014, pp 27-29.

received 139 submissions in total. A list of submitters to the inquiry is included at Appendix 4. A list of the hearings and witnesses is included at Appendix 5.

1.13 The committee thanks the people and organisations that provided their time and views to the committee by providing submissions, attending public hearings and meeting with the committee.

### **Structure of the report**

1.14 Chapter 2 of this final report considers issues related to how Australia can progress towards a successful referendum, and discusses several aspects relating to the committee's work.

1.15 Chapter 3 briefly sets out the committee's consideration of sections 25 and 51(xxvi) of the Constitution.

1.16 Chapter 4 sets out the proposals received by the committee during its inquiry.

1.17 Chapter 5 considers the debate around the insertion of proposed new section 116A, which would see a prohibition of discrimination included in the Constitution.

1.18 Chapter 6 discusses an increased level of parliamentary scrutiny of legislation to assess potential detrimental impacts on Aboriginal and Torres Strait Islander peoples on the basis of race.

1.19 Chapter 7 notes issues related to sovereignty and treaties, and notes the legal advice provided to the committee which indicates that future aspirations for sovereignty and treaties are unlikely to be negated by constitutional recognition.

1.20 Chapter 8 looks at mechanisms for engagement, and considers the role of constitutional conventions in Australia's history.

1.21 Chapter 9 contains concluding remarks on achieving constitutional recognition.



## Chapter 2

### Progressing toward a successful referendum

#### Guide to this chapter

2.1 This chapter sets out the approach taken by the committee in their deliberations and discusses the committee's consideration of relevant issues. The committee has identified the following issues as being significant motivating factors for constitutional recognition:

- the strong view that constitutional recognition of Aboriginal and Torres Strait Islander peoples would be a way to complete the Constitution;
- there should be constitutional recognition of the historical fact that Aboriginal and Torres Strait Islander peoples have lived on the continent now known as Australia for tens of thousands of years;
- the timing of the referendum, noting the important symbolic connections that could be drawn from holding the referendum close to the anniversary of the 1967 referendum in which Aboriginal and Torres Strait Islander peoples were counted in the census;<sup>1</sup> and
- that the proposal must have the support of Aboriginal and Torres Strait Islander peoples.

2.2 The committee has, at all times during its work, had regard to the report of the Expert Panel. The Expert Panel on Constitutional Recognition of Indigenous Australians (the Expert Panel) was led by co-chairs Professor Patrick Dodson and Mr Mark Leibler AC, and was appointed by Prime Minister the Hon Julia Gillard MP to 'consult on the best possible options for a constitutional amendment'.<sup>2</sup>

2.3 As the committee has noted in its previous reports, the Expert Panel conducted 250 consultations in 84 locations across Australia, with the view to providing Parliament with a report on 'the options for constitutional change and approaches to a referendum that would be most likely to obtain widespread support across the Australian community'.<sup>3</sup>

2.4 The Expert Panel released their comprehensive report in January 2012, and brought together the themes from their consultations across Australia, different forms of recognition to be considered, the role of race in the Constitution, a discussion

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1 This approach does not rule out holding the referendum at the next federal election should the Prime Minister decide that the Australia is ready for it to be held at that time.

2 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Interim Report*, July 2014, p. 3.

3 *Recognising Aboriginal and Torres Strait Islander peoples in the Constitution: Report of the Expert Panel*, January 2012, p. v.

around a prohibition of discrimination, discussions around treaties and sovereignty and the historical context for constitutional recognition.<sup>4</sup>

2.5 The committee recognises that constitutional recognition of Aboriginal and Torres Strait Islander peoples would be a significant and enduring achievement for Australia, and has drawn on the work of the Expert Panel, in addition to its own significant work which consisted of a number of private briefings, public hearings, and consultations with advisers, constitutional lawyers, submitters and witnesses.

### **Role of the committee**

2.6 The committee was established to inquire into and report on steps that can be taken to progress toward a successful referendum on constitutional recognition of Aboriginal and Torres Strait Islander peoples. Part of that work included the intention that the committee:

- (a) work to build a secure strong multi-partisan parliamentary consensus around the timing, specific content and wording of referendum proposals for Indigenous constitutional recognition;<sup>5</sup>

2.7 In undertaking its role to build parliamentary consensus around the specific content and wording of the referendum proposals, the committee has considered the proposals, evidence, support and concerns that were raised during its inquiry. The committee notes the complexity associated with the wording of the proposals, and has carefully considered legal and other implications of specific wording.

2.8 With regard to its work, the committee has given due consideration to the report of the Expert Panel and its recommendations. Where the committee has considered proposals that are beyond those of the Expert Panel, it has done so with regard to new advice and evidence that has been put before it since the publication of the Expert Panel's report in 2012.

2.9 The committee spent considerable time consulting with and taking advice from constitutional lawyers. The committee notes the significant work by Professor Megan Davis, Mr Henry Burmester AO QC, Mr Glenn Ferguson, Professor George Williams AO and Professor Anne Twomey.

### **Completing the Constitution**

2.10 The committee considers that the proposal to recognise Aboriginal and Torres Strait Islander peoples in the Constitution can be characterised as an opportunity to complete the nation's founding document. In a speech to Australians for Constitutional Monarchy, the Prime Minister the Hon Tony Abbott MP said that the amendments

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4 *Recognising Aboriginal and Torres Strait Islander peoples in the Constitution: Report of the Expert Panel*, January 2012.

5 Section (1)(a) of the establishment resolution, Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Role of the committee*, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Constitutional\\_Recognition\\_of\\_Aboriginal\\_and\\_Torres\\_Strait\\_Islander\\_Peoples/Role\\_of\\_the\\_Committee](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Constitutional_Recognition_of_Aboriginal_and_Torres_Strait_Islander_Peoples/Role_of_the_Committee) (accessed 19 March 2015).



sought would be a significant step: 'I do...seek constitutional recognition of Aboriginal people in a form that would complete our constitution rather than change it.'<sup>6</sup>

2.11 The Leader of the Opposition, the Hon Bill Shorten MP, stated:

The exclusion of the Aboriginal and Torres Strait Islander people from our Commonwealth's foundation document is a constitutional fault line we must mend, an historical injustice we must address, a national test that we for too long have failed to pass.<sup>7</sup>

...

Our constitution, if we were writing it today, I think in its first sentence would include recognition and a reference to Indigenous Australians, Aboriginal and Torres Strait Islander people, that's if we were writing it today.<sup>8</sup>

2.12 Former leader of the Australian Greens, Senator Christine Milne, said:

We need to build community awareness and educate people so that the whole country is pushing for a referendum...

That's the key thing. We can't have division, we need to celebrate Aboriginal and Torres Strait Islander recognition in our constitution.

It has to be meaningful and that means it has to be supported by the community.<sup>9</sup>

2.13 These views were echoed in a public hearing by Professor John Williams and Dr Matthew Stubbs of the Public Law and Policy Research Unit at the University of Adelaide:

We are, I think, coming to a concluding moment in the drafting of our constitution, so long after the original processes, whereby we can say that we are finishing an unfinished part of our constitution. We as a nation should with pride and with confidence take this step. I have been using an allusion: if the constitution is the birth certificate of our nation, then we have failed to acknowledge half the family. It is an important step in making that commentary about the way that we see ourselves in our fundamental document.<sup>10</sup>

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6 The Prime Minister the Hon Tony Abbott MP, Neville Bonner Oration, 28 November 2014, <https://www.pm.gov.au/media/2014-11-28/neville-bonner-oration-0> (accessed 3 March 2015).

7 The Leader of the Opposition the Hon Bill Shorten MP, speech to RECOGNISE, 11 December 2014, <http://billshorten.com.au/recognise> (accessed 3 March 2015).

8 The Leader of the Opposition the Hon Bill Shorten MP, interview with Patricia Karvelas, RN Drive, 18 March 2015, <http://billshorten.com.au/interview-republic-indigenous-constitutional-recognition> (accessed 19 March 2015).

9 Senator Christine Milne, Leader of the Australian Greens, 'Time to rally community behind constitutional recognition', Media Release, 26 January 2015.

10 *Committee Hansard*, 13 March 2015, p. 1.

2.14 The Aboriginal and Torres Strait Islander Act of Recognition Review Panel (Review Panel),<sup>11</sup> in their 2014 report, raised the importance of constitutional recognition to the people of Australia:

It is readily apparent from the research that most Australians want to ensure that the Constitution reflects what it means to be Australian in the 21st century. We have a landmark opportunity to recognise our first peoples and ensure the Constitution never again allows for the omissions and inequalities that have happened in the past. It would allow us to protect what is uniquely Australian and acknowledge over 40,000 years of history. It ensures our Constitution reflects our values and recognises the equal worth and dignity of each citizen.<sup>12</sup>

2.15 At a public hearing in Broome, Western Australia, Mr Nolan Hunter, Chief Executive Officer of the Kimberley Land Council, spoke of the need to recognise Aboriginal and Torres Strait Islander peoples in the Constitution by saying that 'the point is that it has to right a historical wrong'.<sup>13</sup>

2.16 The committee agrees that constitutional recognition would confirm the historical fact that Aboriginal and Torres Strait Islander peoples have occupied the land and waters now known as Australia for tens of thousands of years.

2.17 During the framing of the Constitution, a series of conferences and conventions were held in which the contents were debated and voted on. The draft constitution went to a referendum and was ratified by five of the colonies. During the convention debates, Aboriginal and Torres Strait Islander peoples were excluded from participation, and from voting in the referendums.

2.18 Two references to Aboriginal peoples were included in the Constitution, one which denied the Commonwealth Parliament power to make laws with regard to Aboriginal peoples,<sup>14</sup> and one which denied Aboriginal people the right to be counted in the census.<sup>15</sup>

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11 The Review was required by the *Aboriginal and Torres Strait Islander Recognition Act 2013* and established 'to conduct a review into public support for Indigenous constitutional recognition'. It was announced by Senator the Hon Nigel Scullion, Minister for Indigenous Affairs, on 28 March 2014. The Review Panel drew upon 'the significant consultations and public opinion research undertaken by the Expert Panel between May and October 2011...the work of Reconciliation Australia through its 'Recognise' campaign (previously known as 'You Me Unity')...the work of the Joint Select Committee; and other relevant research and surveys'. *Final Report of the Aboriginal and Torres Strait Islander Act of Recognition Review Panel*, September 2014, p. 10.

12 *Final Report of the Aboriginal and Torres Strait Islander Act of Recognition Review Panel*, September 2014, p. 3.

13 *Committee Hansard*, 21 July 2014, p. 6.

14 Section 51(xxvi), which was amended at the 1967 referendum by deleting the words 'other than the aboriginal race in any State'.

15 Section 127, since deleted.

2.19 The referendum in 1967 saw the sections which specifically referred to Aboriginal people deleted from the Constitution. This enabled Aboriginal people to be counted in the census, and gave the Commonwealth Parliament the power to make laws with regard to Aboriginal peoples.

2.20 Professor Megan Davis and Professor George Williams AO have written that the 1967 referendum was the result of 'decades of agitation and advocacy by Aboriginal and Torres Strait Islander peoples and their supporters'.<sup>16</sup> They note that the right to vote in Commonwealth elections had been extended to Aboriginal and Torres Strait Islander peoples in 1962, and that 'it was clearly absurd for Indigenous Australians to have the vote, only for section 127 of the Constitution to deny them the right to be counted for the purposes of determining electoral districts'.<sup>17</sup>

***Concurrent debate as a means to focus public attention***

2.21 In its Progress Report, the committee recommended that each House of Parliament set aside a full day of sitting to debate concurrently the recommendations of the Progress Report.<sup>18</sup>

2.22 The committee reiterates its recommendation for the House of Representatives and the Senate to set aside a full day of sitting with a view to concurrent debate of the recommendations of this report, in order to achieve near-unanimous parliamentary support for the referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution.

2.23 At public hearings, witnesses spoke about the need for strong political leadership on constitutional recognition. The committee considers that concurrent debate would allow members of the Australian Parliament to present their views publicly, and to stimulate and lead debate in their electorates.<sup>19</sup>

2.24 The committee has considered past instances where the parliament has set aside a significant period of time during sittings to debate a matter of great significance, such as the apology to Aboriginal and Torres Strait Islander peoples, and the introduction of the National Disability Insurance Scheme.

2.25 In 2008, an apology to Aboriginal and Torres Strait Islander peoples was delivered by the Prime Minister the Hon Kevin Rudd MP which reflected on past discrimination and mistreatment of Aboriginal and Torres Strait Islander peoples, with particular regard to those people who were removed from their families.

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16 M. Davis & G. Williams, *Everything you need to know about the referendum to recognise Indigenous Australians*, NewSouth Publishing, Sydney, 2015, p. 29.

17 M. Davis & G. Williams, *Everything you need to know about the referendum to recognise Indigenous Australians*, NewSouth Publishing, Sydney, 2015, p. 29.

18 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Progress Report*, October 2014, p. ix.

19 *Committee Hansard*, 21 July 2014, p. 22; *Committee Hansard*, 23 July 2014, p. 11; *Committee Hansard*, 13 August 2015, p. 6; *Committee Hansard*, 6 November 2014, p. 27; *Committee Hansard*, 20 February 2015, p. 8, p. 11.

2.26 The apology, having been issued as a motion to be voted on, was unanimously adopted.<sup>20</sup> The motion was then raised in the Senate, where it passed unanimously.

2.27 In 2013, each House of Parliament dedicated a significant amount of time to debating the National Disability Insurance Scheme Bill 2012 after it was introduced by Prime Minister the Hon Julia Gillard MP. During the second reading debates it was noted that the scheme was 'above politics' and commanded bipartisan support.<sup>21</sup> A significant majority of members of the House of Representatives and senators spoke in support of the bill and commended it to the houses.<sup>22</sup>

2.28 The Hon Jenny Macklin MP, at the time Minister for Families, Community Services and Indigenous Affairs, and Minister for Disability Reform, said during that bill's second reading speech:

It is true that it is rare that a proposed reform of this size strikes such a chord with so many of us across political lines. The consensus in the House does reflect the consensus across the Australian community.<sup>23</sup>

2.29 The committee commends the Houses of Parliament for dedicating a significant amount of time to the second reading debate of such an important bill, and considers that the issue of constitutional recognition of Aboriginal and Torres Strait Islander peoples should command a similar level of wide-ranging multipartisan support, and that its significance demands concurrent sittings.

### **Committee view**

2.30 The committee considers that concurrent debate in each House of Parliament would be a means to focus public attention on the question of constitutional recognition of Aboriginal and Torres Strait Islander peoples. By setting aside a full day of sitting in each house, the parliament would deliver a strong and unified statement of the significance of this question to the Australian public.

2.31 Further, it would allow members of parliament to lead debate on this question in their electorates and stimulate and encourage public discussion.

### **Recommendation 1**

**2.32 The committee recommends that each House of Parliament set aside a full day of sitting to debate concurrently the recommendations of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, with a view to achieving near-unanimous support for and build momentum towards a referendum to recognise Aboriginal and Torres Strait Islander peoples.**

20 Six members of parliament, however, were absent from the vote.

21 Mr Michael McCormack MP, *House of Representatives Hansard*, 12 February 2013, p. 899; The Hon Christopher Pyne MP, *House of Representatives Hansard*, 13 March 2013, p. 1983.

22 Parliament of Australia, *National Disability Insurance Scheme Bill 2013*, [http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=r4946](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4946) (accessed 2 April 2015).

23 The Hon Jenny Macklin MP, *House of Representatives Hansard*, 14 March 2013, p. 2112.

## Timing

2.33 Evidence put to the committee around the timing of the referendum has centred on the following two options:

- that the referendum be held concurrently with the next federal election; and
- that the referendum be held to coincide with the 50<sup>th</sup> anniversary of the 1967 referendum.

2.34 In its Progress Report, the committee took the view that momentum for the referendum would build once the wording was finalised and made available to the public. Since that report, it has been suggested that the referendum be held in 2017 to align with the 50<sup>th</sup> anniversary of the 1967 referendum.

2.35 Professor Patrick Dodson, writing in 2010 provided the following rationale:

Perhaps the vote should be held on or near the anniversary of the 1967 referendum - May 27 - so as to advance the demand of that earlier generation "for a just relationship between our peoples" to its next logical step - a proper recognition of the indigenous people of Australia as the First Peoples, and acknowledgement of our culture, our languages and our economies within the constitutional firmament.<sup>24</sup>

2.36 The Prime Minister the Hon Tony Abbott MP echoed this idea in a speech last year to RECOGNISE, saying: 'I hope that it might happen on the 50th anniversary of the 1967 referendum, May 27, 2017. That would be a richly symbolic time to complete our constitution'.<sup>25</sup>

2.37 The committee considers that while the 50<sup>th</sup> anniversary of the 1967 referendum may be symbolic, the more important point is for it to be held when it has the highest chance of success. The committee further notes that the most cost effective approach would be to hold it concurrently with a federal election.

2.38 It has been argued that when referendums are held on election days, the referendum question becomes politicised; however, of the eight referendums that have been successful, four were held on election days and four were held mid-term.<sup>26</sup>

## Committee view

2.39 The committee has considered the issues around the timing of the referendum and believes that while timing is an important aspect of the referendum, that

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24 P. Dodson, *Genuine attempt to write First Peoples into nation's contract*, 15 November 2010, The Sydney Morning Herald, <http://www.smh.com.au/federal-politics/political-opinion/genuine-attempt-to-write-first-peoples-into-nations-contract-20101114-17sm8.html> (accessed 5 March 2015).

25 The Prime Minister the Hon Tony Abbott MP, Speech to RECOGNISE, 11 December 2014, <http://www.pm.gov.au/media/2014-12-11/address-recognise-inaugural-gala-dinner-sydney-0> (accessed 3 March 2015).

26 G. Williams & D Hume, *People Power: The History and Future of the Referendum in Australia*, UNSW Press, 2010, pp 95-96.

ultimately it should be held at a time when it is most likely to succeed regardless of whether that time coincides with a federal election, or the 50<sup>th</sup> anniversary of the 1967 referendum.

## **Recommendation 2**

**2.40 The committee recommends that the referendum on constitutional recognition be held when it has the highest chance of success.**

### **Comparative jurisdictions**

2.41 During this inquiry, the committee has had regard to the way that constitutional recognition of Indigenous peoples has been achieved around the world.

2.42 Many countries around the world have recognised Indigenous peoples through constitutional arrangements. The committee notes that within the Commonwealth, only Australia, the United Kingdom and Brunei Darussalam do not have recognition of fundamental human rights in a section or sections of their respective constitutions.<sup>27</sup>

2.43 The Singapore Declaration of Commonwealth Principles 1971 (Singapore Declaration) sets out the core values of commonwealth nations, and was agreed upon by the Commonwealth Heads of Government at their first meeting. The Singapore Declaration puts the right to be free from discrimination on the basis of race at the centre of these values of the Commonwealth.<sup>28</sup>

2.44 In the section below, the committee discusses consideration to the way that constitutional recognition has been achieved in Norway, Canada and New Zealand. The committee considers that this offers useful precedents to demonstrate the way in which nations have recognised Indigenous peoples in their founding documents, and protected their citizens from racial discrimination.

### **Norway**

2.45 Constitutional recognition of Norway's Indigenous Sami peoples occurred in 1989 through the establishment of a Sami Parliament and recognition in the Constitution of Norway. There are around 40,000 Sami living in Norway who are represented in the Sameting or Samediggi (Sami Parliament).

2.46 The Norwegian Constitution recognises the Sami in article 108:

The authorities of the state shall create conditions enabling the Sami people to preserve and develop its language, culture and way of life.<sup>29</sup>

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27 Parliament of Canada, Charters of Rights in Commonwealth Countries, <http://www.parl.gc.ca/parlinfo/compilations/Constitution/CharterOfRights.aspx> (accessed 25 March 2015). The United Kingdom does not have a constitution.

28 Commonwealth Secretariat, *Singapore Declaration of Commonwealth Principles 1971*, <http://thecommonwealth.org/sites/default/files/history-items/documents/Singapore%20Declaration.pdf> (accessed 7 April 2015).

29 Article 108 of the Norwegian Constitution.

2.47 The Norwegian Constitution is the oldest written constitution in Europe still in operation, and having come into effect in 1814, recently celebrated its bicentenary. The Norwegian Constitution includes recognition of a number of human rights:

Among the rights presently guaranteed by the Constitution, the aspects of the rule of law principle that no one may be convicted of a crime except according to law or punished except by virtue of a court judgement, the freedoms of speech and of religion, the right to vote, the protection of the value of your property and the ban on retroactive legislation may be mentioned.<sup>30</sup>

2.48 Article 110c of the Norwegian Constitution sets out that it is the responsibility of the State to respect and ensure international human rights. Amendments were made in 2014 to enshrine a number of human rights.<sup>31</sup>

2.49 The *Sami Act 1987* establishes the Sami Parliament and sets out Sami legal matters, and is intended 'to enable the Sami people in Norway to safeguard and develop their language, culture and way of life'.<sup>32</sup>

### **Canada**

2.50 The *Canadian Charter of Rights and Freedoms* (Canadian Charter) is entrenched in the Constitution of Canada and is a bill of rights, enacted in 1982.

2.51 The Canadian Charter guarantees a number of rights, including:

...democratic rights, liberty rights, the right to free expression and to follow the religion of one's choice, rights of association, rights against undue intrusion of the state in the guise of the police power and the right to a fair trial. And like most modern bills of rights, it guarantees equality.<sup>33</sup>

2.52 Part II of the Canadian Charter specifically sets out the rights of Canada's Aboriginal people:

#### **RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA**

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

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30 The Storting, *The Constitution*, <https://www.stortinget.no/en/In-English/About-the-Storting/The-Constitution/> (accessed 25 March 2015).

31 These amendments included the: 'right to equality before the law, the right to a fair trial, and prohibitions against the death penalty, torture and inhumane treatment. Other key rights included freedom of association and assembly, children's right to respect and being heard, and that everyone has the right to education, along with a prohibition against arbitrary detention'. E. Woodgate, *Constitution gets historic overhaul*, <http://www.newsinenglish.no/2014/05/15/constitution-gets-a-historic-overhaul/> (accessed 14 April 2015).

32 The Government of Norway, *The Sami Act*, <https://www.regjeringen.no/en/dokumenter/the-sami-act/id449701/> (accessed 25 March 2015).

33 The Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada, 'Equality: the most difficult right', *Supreme Court Law Review* (2001), 14 S.C.L.R. (2d): 17-27, p. 17.



### **Definition of “aboriginal peoples of Canada”**

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the “Constitution Act, 1867”, to section 25 of this Act or to this Part,

(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.<sup>34</sup>

2.53 The Canadian Charter affirms the existing treaties of the Aboriginal peoples of Canada and the Supreme Court of Canada has called the protection of the rights of Indigenous peoples an 'underlying constitutional value'.<sup>35</sup>

### ***New Zealand***

2.54 The Treaty of Waitangi, signed in 1840 was a significant moment in the relationship between the Maori people, represented by 500 Maori chiefs, and the Crown, and is 'the agreement from which New Zealand's constitutional government has developed'.<sup>36</sup> In signing the treaty, the Crown has maintained that sovereignty was ceded by the Maori.<sup>37</sup>

2.55 The treaty has three articles, which were translated into the Maori language for the signatory chiefs. The differences between the Maori translation and the English versions of the treaty have been the subject of much debate since the signing of the treaty.

- Article 1 stated that the monarch of Great Britain has the right to rule over New Zealand;

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34 Department of Justice, *Constitution Acts 1867 to 1982*, <http://laws-lois.justice.gc.ca/eng/Const/page-16.html#h-52> (accessed 25 March 2015).

35 [1998] 2 S.C.R. 217 para 82.

36 Dominic O'Sullivan, 'The Treaty of Waitangi in Contemporary New Zealand Politics', *Australian Journal of Political Science*, Vol. 43, No. 2, June 2008: 317-331, p. 317.

37 Dominic O'Sullivan, 'The Treaty of Waitangi in Contemporary New Zealand Politics', *Australian Journal of Political Science*, Vol. 43, No. 2, June 2008: 317-331, p. 319.



- Article 2 allows the Maori chiefs to retain their lands and chieftainships, agreeing to engage in land deals only with the British; and
- Article 3 stated that all Maori would be given the same rights as given to the British and the Queen's protection.<sup>38</sup>

2.56 In addition to the treaty, seven seats are now reserved in New Zealand's unicameral parliament for Maori. The *Maori Representation Act 1867* (NZ) initially set aside four seats for Maori representatives in the parliament. The introduction of the mixed member proportional representation voting system in 1993 saw the establishment of three new electorates, based on the number of people enrolled on the Maori electoral roll.<sup>39</sup>

2.57 Initially brought in as a temporary measure, the reserved seats were made permanent in the 1870s. The seats are viewed as a mechanism of engagement:

...contemporary arguments in favour of retaining the Maori seats rely more on a claim that their existence acknowledges the right of Maori, as *tangata whenua* (people of the land), to participate in the national political process through representatives who have been chosen by Maori voting amongst themselves.<sup>40</sup>

2.58 The committee has included these examples in this report to show that rather than being a novel idea, constitutional recognition of Indigenous peoples enjoys several international precedents.

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38 Claudia Orange, 'Treaty of Waitangi', *Te Ara*, <http://www.teara.govt.nz/en/treaty-of-waitangi/page-2> (accessed 25 March 2015).

39 New Zealand Electoral Commission, *Maori Representation*, <http://www.elections.org.nz/voting-system/maori-representation> (accessed 1 April 2015).

40 Andrew Geddis, 'Dedicated indigenous representation in New Zealand's Parliament', *Public Law Review* 233, 2014, 25: 240-245, p. 243.



## Chapter 3

### The removal of Race from the Constitution and the retention of the 1967 referendum result

#### Sections 25 and 51(xxvi) of the Constitution

3.1 The committee has previously reported on the proposed repeal of sections 25 and section 51(xxvi) of the Constitution, which state:

##### **Provision as to races disqualified from voting**

For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.<sup>1</sup>

##### **51. Legislative powers of the Parliament**

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(xxvi) the people of any race for whom it is deemed necessary to make special laws;<sup>2</sup>

3.2 Section 25 holds that if a state were to disqualify a race of people from voting in the lower house of that state, that it would reduce the level of Commonwealth representation for that state, because that race would then not be counted towards calculating federal representation.<sup>3</sup>

3.3 As noted in Chapter 2, the referendum in 1967 saw the amendment of section 51(xxvi) to remove the reference to Aboriginal people and give the Commonwealth the power to legislate for Aboriginal and Torres Strait Islander peoples.

3.4 In its Interim Report, the committee discussed the removal of the section and referred to the work of the Expert Panel, who described the section as 'a racially discriminatory provision that contemplates the disqualification of all persons "of any race" from voting in State elections'.<sup>4</sup> The Expert Panel's first recommendation was that the section be removed from the Constitution.

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1 *Australian Constitution*, Section 25.

2 *Australian Constitution*, Section 51.

3 Professor Anne Twomey, 'An obituary for s 25 of the Constitution', (2012) 23 *Public Law Review*, 125–41, p. 125.

4 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 137.

3.5 The committee reported that it was persuaded that the repeal of section 25 of the Constitution has overwhelming support, with submitters and witnesses noting the lack of ongoing utility of the section as well as its 'out-dated' reference to race.<sup>5</sup>

3.6 The committee reported its consideration that the section could be removed without consequential effects.<sup>6</sup>

3.7 Since its Interim Report, the committee has continued to hear from submitters and witnesses that the removal of this section would be welcomed, with no arguments put forward to retain it.

3.8 At a public hearing, Professor David Flint, National Convenor of Australians for a Constitutional Monarchy, explained that the section is a 'dead letter':

This comes from the period when, in relation to the immigration of people from certain races and in relation to Indigenous people, state constitutions, state laws, would make provisions along those lines. I think it is a no longer relevant part of the Constitution.<sup>7</sup>

#### *Potential inconsistency*

3.9 The committee has considered evidence in submissions and in public hearings which suggests there is inconsistency in removing reference to race by the proposed repeal of section 25 and the proposed repeal of section 51(xxvi) on the one hand, and then inserting a power based on race that would apply solely to Aboriginal and Torres Strait Islander peoples.

3.10 FamilyVoice Australia argued that any amendments, such as the three options put forward in the committee's Interim Report, would particularise Aboriginal and Torres Strait Islander peoples rather than remove references to race.<sup>8</sup>

3.11 Mr Gordon Chalmers expressed his concerns in the following way:

...the proposed constitutional amendments, despite apparently being concerned with repealing outdated racial powers from the Constitution, will actually result in the continued legal racialisation of the original peoples of this continent.<sup>9</sup>

3.12 On the other hand, Professor Megan Davis and Professor George Williams AO wrote that 'mentioning a group of people in the Constitution is not unusual', and that the Constitution does so where 'the Constitution needs to identify particular peoples for purposes such as voting'. They continued:

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5 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Interim Report*, July 2014, pp 6-7.

6 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Interim Report*, July 2014, p. 7.

7 *Committee Hansard*, 20 February 2015, p. 47.

8 *Submission 84*, p. 9.

9 *Committee Hansard*, 13 March 2015, p. 37.

Making mention of Aboriginal people in the Constitution would be consistent with this. They would be referred to not due to any unscientific sense that they form a distinct racial group, but because it is appropriate that the Constitution mention them as the original inhabitants and first peoples of Australia. The Constitution would recognise them because they have a historical and cultural connection to the land upon which the nation has been founded.<sup>10</sup>

### **Committee view**

3.13 The committee heard concerns over the potential inconsistency of removing a reference to race in section 25 and then inserting a new power seen to be based on race. The committee considers that the removal of section 25 is integral to achieving constitutional recognition. The committee considers that constitutional recognition would not 'single out' Aboriginal and Torres Strait Islander peoples, but would instead remedy the long-held exclusion of Aboriginal and Torres Strait Islander peoples from the Constitution. The committee has carefully considered the wording in all proposals for constitutional recognition and has heard advice from constitutional lawyers, Aboriginal and Torres Strait Islander peoples and all who gave evidence or made submissions in order to assess whether constitutional recognition would have the unintended effect of 'racialising' the Constitution.

3.14 The committee agrees with Professors Davis and Williams<sup>11</sup> that making particular mention of Aboriginal and Torres Strait Islander peoples would not be done on the basis of race, but would be to recognise the unique role of Australia's first inhabitants.

3.15 It is the view of the committee that section 25 of the Constitution adds no value to the operation of the Commonwealth. The committee considers that while it does not add any value and has been called a 'dead letter', its presence causes considerable concern with regard to its potential application.

3.16 The committee is not convinced of any ongoing utility of section 25, or that it has any place in the Constitution.

3.17 It is the committee's view that section 51(xxvi) should be repealed or amended in conjunction with recognition of Aboriginal and Torres Strait Islander peoples in the Constitution and the repeal of section 25.<sup>12</sup> The committee is keen to ensure that the intent of the 1967 referendum is maintained, and recommends the replacement of section 51(xxvi). In Chapter 4, the committee puts forward three options for the wording of the replacement section which would retain the persons power.

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10 M. Davis & G. Williams, *Everything you need to know about the referendum to recognise Indigenous Australians*, NewSouth Publishing, Sydney, 2015, p. 119.

11 M. Davis & G. Williams, *Everything you need to know about the referendum to recognise Indigenous Australians*, NewSouth Publishing, Sydney, 2015, p. 119.

12 The committee reported on section 51(xxvi) in its Interim Report, Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Interim Report*, July 2014, pp 7-10.

3.18 In summary, the committee believes that the continued presence of these sections is at odds with a modern Australia and does not represent Australian values. The committee believes that this outdated section of the Constitution must be repealed in order for constitutional recognition to occur.

### **Recommendation 3**

**3.19 The committee recommends that section 25 of the Constitution be repealed.**

### **Recommendation 4**

**3.20 The committee recommends the repeal of section 51(xxvi) and the retention of a persons power so that the Commonwealth government may legislate for Aboriginal and Torres Strait Islander peoples as per the 1967 referendum result.**

# Chapter 4

## Proposals for constitutional change

4.1 The committee has considered many proposals for constitutional recognition during the course of its work, including proposals that it has previously reported through its Interim Report of July 2014 and its Progress Report of October 2014. These proposals are summarised below and divided in the following ways:

- proposals which largely support the recommendations of the Expert Panel;
- proposals which draw on the recommendations of the Expert Panel; and
- alternative models proposed in submissions and public hearings.

### Proposals which support the recommendations of the Expert Panel

4.2 The committee notes the very high degree of support provided for the recommendations of the Expert Panel through submissions<sup>1</sup> and by witnesses in public hearings.<sup>2</sup> The recommendations of the Expert Panel are at Appendix 1.

### Proposals which go beyond the recommendations of the Expert Panel

#### *The Expert Panel's proposed new section 51A*

4.3 While most submissions were supportive of the Expert Panel proposals, the committee also received submissions which suggested options other than those recommended by the Expert Panel, but which generally drew on proposed new section 51A as a foundation, with alternative wording.

4.4 The proposed new section 51A recommended by the Expert Panel is a statement of recognition using preambular language in order to recognise that Aboriginal and Torres Strait Islander peoples were the first peoples of the continent now known as Australia.

#### **Section 51A Recognition of Aboriginal and Torres Strait Islander peoples**

**Recognising** that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

**Acknowledging** the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

**Respecting** the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

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1 *Submissions 1, 7, 10, 11, 13, 19, 26, 28, 32, 36, 37, 47, 48, 51, 52, 56, 64, 77, 91, 94, 99, 103, 108, 110.*

2 *Committee Hansard*, 13 November 2014, p. 17, p. 35; *Committee Hansard*, 20 February 2015, p. 1, p. 9.

**Acknowledging** the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;

the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.<sup>3</sup>

4.5 Advice provided to the Expert Panel and which drew upon consultations undertaken by Mr Henry Burmester AO QC, Professor Megan Davis and Mr Glenn Ferguson, referred to a number of variations of the wording of proposed new section 51A. Many of the variations centred around changing the power into a subject matter power, a purposive subject matter power, or a persons power.<sup>4</sup>

### *The Committee's proposed new section 51A*

4.6 In its Progress Report, the committee recommended that the wording put forward by the Expert Panel be amended to remove the last line of preambular language, noting a lack of public support for its inclusion. The committee noted that the use of the term 'advancement' may be problematic, as its legal meaning does not equate to its popular meaning.<sup>5</sup> Aboriginal and Torres Strait Islander peoples expressed strong concerns with the use of the word advancement because it can convey a sense of negativity.

4.7 A lack of community and legal support for the word 'advancement' was put forward at public hearings, with Mr Shane Duffy, Chief Executive Officer of the Aboriginal and Torres Strait Islander Legal Services highlighting that the word could be used in different ways:

But what is the potential for that word 'advancement' to be bastardised for people's own skewed or conjured view of what advancement really means?<sup>6</sup>

4.8 Professor Patrick Dodson noted that although the word 'advancement' may be problematic, the intent to improve the lives of Aboriginal and Torres Strait Islander peoples was important:

I note that the word 'advance' has a chequered history. But it also is used in other contexts. There is a political legacy and baggage that comes with the term; there is a legal interpretation. It is a question of what is the best legal term to meet what it is that is intended—that is, that there be laws made that

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3 *Recognising Aboriginal and Torres Strait Islander peoples in the Constitution: Report of the Expert Panel*, January 2012, p. xvii.

4 Correspondence received from Minister Scullion. After the final report of the Expert Panel, a series of consultations were held with members of the legal community seeking advice and comment on the Expert Panel's recommendations. These consultations were done by Professor Davis, Mr Burmester AO QC and Mr Ferguson.

5 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Progress Report*, October 2014, pp 6-7.

6 *Committee Hansard*, 30 June, p. 5.



will in fact be beneficial to the Aboriginal and Torres Strait Islander peoples.<sup>7</sup>

4.9 The committee's Progress Report recommended, in its option 1, that the following version of proposed new section 51A be put forward:

**51A Recognition of Aboriginal and Torres Strait Islander peoples**

**Recognising** that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

**Acknowledging** the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

**Respecting** the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.

***Definitions of legislative powers***

4.10 The Commonwealth's power to make laws with respect to the people of any race, as in section 51(xxvi) of the Constitution, is known as a 'persons power'. Other examples of the persons power in the Constitution is the aliens power (s 51(xix)) and corporations power (s 51(xx)).

4.11 Other heads of power in the Australian Constitution are characterised as 'subject matter powers', where the Commonwealth's legislative powers are organised by subject. For example, the Commonwealth has the power to legislate for 'postal, telegraphic, and other like services'<sup>8</sup> and also 'lighthouses, lightships, beacons and buoys'<sup>9</sup>. If a subject matter power were employed for the recognition of Aboriginal and Torres Strait Islander peoples, it would need to be broad enough to cover all subject matters on which it would be desirable to enable legislation and include existing legislation in relation to native title, the protection of Indigenous heritage and Aboriginal and Torres Strait Islander corporations.<sup>10</sup>

4.12 A purposive power refers to the wording 'for the purpose of' in the Constitution. Examples of a purposive power include the defence power, the nationhood power and part of the external affairs power in relation to treaties.<sup>11</sup>

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7 *Committee Hansard*, 21 July 2014, p. 20.

8 *Australian Constitution*, Section 51 (v).

9 *Australian Constitution*, Section 51 (vii).

10 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Interim Report*, July 2014, pp 12-13.

11 Professor Anne Twomey, 'A Revised Proposal for Indigenous Constitutional Recognition', *Sydney Law Review*, 2014, Vol 36: 381-411, pp 403-404.

4.13 Professor Anne Twomey has considered the use of a purposive power in order to provide a constitutionally valid head of power that would preserve relevant existing laws that have been made in reliance on the existing race power in section 51(xxvi):

A third alternative would be to phrase the power in such a way as to indicate to the High Court that the power is intended to be a purposive power. Purposive powers form a well-recognised category of legislative power with an accepted test that is applied by the courts to assess the validity of laws.<sup>12</sup>

***Proposed new Chapter IIIA, section 80A***

4.14 During a briefing to the committee, draft wording for a proposed new chapter IIIA, including proposed new section 80A, was provided by Mr Henry Burmester AO QC, Professor Megan Davis and Mr Glenn Ferguson:

**CHAPTER IIIA**

**Aboriginal and Torres Strait Islander Peoples**

**Section 80A**

- (1) Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

Respecting the continuing cultures and heritage of Aboriginal and Torres Strait Islander peoples;

Acknowledging that Aboriginal and Torres Strait Islander languages are the original Australian languages and a part of our national heritage;

the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to protecting the cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples [including their traditional connection to land and waters], and in order to overcome disadvantage or ameliorate the effects of past discrimination against them.

- (2) This section provides the sole power for the Commonwealth to make special laws for Aboriginal and Torres Strait Islander peoples.

**Alternative formulations for head of power**

...power to make laws...with respect to Aboriginal and Torres Strait Islander peoples, but so as not to discriminate against them.<sup>13</sup>

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12 Professor Anne Twomey, 'A Revised Proposal for Indigenous Constitutional Recognition', *Sydney Law Review*, 2014, Vol 36: 381-411, p. 403.

13 Mr Henry Burmester AO QC, Professor Megan Davis and Mr Glenn Ferguson, *Draft Alternative Constitutional Amendment*, p. 1.

4.15 Proposed new section 80A puts forward two options for a head of power: a subject matter power as seen above at subsection (1), and an alternative 'persons power'. As noted above, a subject matter power would need to be broad enough to cover all subject matters on which the Commonwealth wishes to enact legislation.<sup>14</sup> The persons power put forward in this proposal may alleviate the risk involved in drafting a subject matter power.

4.16 Mr Burmester AO QC elaborated on the proposed new section 80A, by noting that it would draw together ideas from consultations held with lawyers, and would include:

...a statement of recognition and other amendments, including the new head of power, in a new chapter in the Constitution. The committee will recall that the panel proposed a new section 51A, which had the preamble and the new head of power, and then a separate section 116A with the nondiscrimination. But there was a suggestion, which certainly to me has some appeal, that maybe, if one can combine all of the proposed amendments in a new chapter of the Constitution, it will be clear that they all fit together and that there is only one proposal on the table that people have to focus on and vote for rather than there being provisions in different parts of the constitution.<sup>15</sup>

4.17 Mr Burmester AO QC went onto note that the proposal would 'give clarity and coherence, and having a new chapter with a new heading of 'Aboriginal and Torres Strait Islander peoples' would certainly give significance to the issue that we are trying to address'.<sup>16</sup>

### ***Proposed new chapter 1A and section 60A***

4.18 The Public Law and Policy Research Unit (PL&PRU) at the University of Adelaide proposed a new section be inserted into the Constitution which recognises Aboriginal and Torres Strait Islander peoples and offers a limited prohibition of discrimination included in subsection (2). It draws on the proposed new section 80A, as discussed above:

#### **60A Recognition of Aboriginal and Torres Strait Islander Peoples**

Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

Respecting the continuing cultures and heritage of Aboriginal and Torres Strait Islander peoples;

Acknowledging that Aboriginal and Torres Strait Islander languages are the original Australian languages and a part of our national heritage;

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14 See Section 4.8, above.

15 *Committee Hansard*, 21 February 2014, p. 14.

16 *Committee Hansard*, 21 February 2014, p. 14.

(1) The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.

(2) Laws specially applicable to Aboriginal and Torres Strait Islander peoples, whether enacted under this section or under any other provision of the Constitution, or by a State or Territory, shall not discriminate adversely against them.<sup>17</sup>

4.19 This proposal draws upon a 'persons power' rather than a 'subject matter power', by stating that the Commonwealth may legislate with respect to Aboriginal and Torres Strait Islander peoples.

4.20 The PL&PRU noted that as the prohibition of discrimination in their proposed new section 60A refers specifically to legislation relating to Aboriginal and Torres Strait Islander peoples:

...our proposed s 60A...provides a logical connection between the new legislative power and a guarantee against adverse discrimination which is expressly stated (rather than implied) but is clearly limited to laws 'specially applicable' to Aboriginal and Torres Strait Islander peoples. Thus, it does only what is necessary to secure the full effect and purpose of the Constitutional reform.<sup>18</sup>

4.21 They argue that their proposed new section 60A clarifies the applicability of a prohibition of discrimination:

Further, the proposed s 60A makes plain what would otherwise be a matter of implication, namely that the prohibition of adverse discrimination applies not only to the new section but to laws made under any other provision of the Constitution.<sup>19</sup>

4.22 The PL&PRU have advised the committee that an alternative formulation of subsection (2) discussed above is as follows:

**60A Recognition of Aboriginal and Torres Strait Islander Peoples**

Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;<sup>20</sup>

Respecting the continuing cultures and heritage of Aboriginal and Torres Strait Islander peoples;

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17 *Submission 42*, p. 6.

18 *Submission 42*, p. 9.

19 *Submission 42*, pp 8- 9.

20 Following meetings with state and territory attorneys-general, the committee considers that it is possible to remove the words 'traditional lands and waters' to address concerns raised by some attorneys-general about the possible legal consequences that may flow from including these words.

Acknowledging that Aboriginal and Torres Strait Islander languages are the original Australian languages and a part of our national heritage;

(1) The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.

(2) A law of the Commonwealth, a State or a Territory must not discriminate adversely against Aboriginal and Torres Strait Islander peoples.

4.23 This would achieve the same outcome; that is, prevent adverse discrimination against Aboriginal and Torres Strait Islander peoples.<sup>21</sup>

4.24 The committee heard evidence that use of the terms 'adverse discrimination' and 'discriminate adversely' makes express what the international law of racial discrimination reflects, which is that 'a differentiation of treatment will not constitute discrimination if the criteria for such differentiation...are legitimate'.<sup>22</sup> The committee understands that the Constitution of South Africa uses the phrase 'unfair discrimination' to convey the same idea.<sup>23</sup>

4.25 While the intent of subsection (2), which sets out that a Commonwealth, state or territory law must not discriminate adversely against Aboriginal and Torres Strait Islander peoples is admirable, the committee acknowledges that it may prove contentious. The committee heard that the use of the term 'discriminate adversely' may lead to unintended consequences of interpretation.

### ***Subject matter power***

#### ***Proposed new section 51A***

4.26 Allens, in their submission, drew upon the recommendation of the Expert Panel for proposed new section 51A and suggested that rather than a 'peoples power' or 'persons power', a 'subject matter power' be drafted in its place. They explained their suggestion and compared the two powers:

The two preferred methods for conferring a power on the Commonwealth to legislate with respect to Aboriginal and Torres Strait Islander peoples are:

I. A 'People's Power', which has been drafted (in Option 1 in the Progress Report) in the following terms:

*'the power to make laws [for the peace order and good government of the Commonwealth] with respect to Aboriginal and Torres Strait Islander peoples'; and*

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21 Dr Gabrielle Appleby, email, 20 March 2015.

22 Committee on the Elimination of All Forms of Racial Discrimination, General Recommendation 14; Dr Gabrielle Appleby, email, 20 March 2015.

23 Section 8.

- II. A 'Subject Matter Power', which we propose could be drafted in the following terms:

*'the power to make laws [for the peace, order and good government of the Commonwealth] with respect to the culture, language and heritage of Aboriginal and Torres Strait Islander peoples and their relationship with their traditional land and waters.'*<sup>24</sup>

4.27 They noted that a potential criticism of their proposal was the list of subject matters for inclusion, but argued that the concepts they had included were enduring:

We acknowledge that one problem with the Subject Matter Power, identified by Dixon and Williams, is that creating a list of items for inclusion always suffers from the risk that the list will be interpreted as exhaustive when it was perhaps not intended to be. Our formulation is expressed to be exhaustive. This is because, in our opinion, concepts of culture, language and heritage are enduring concepts, and capture the essence of constitutional recognition, when coupled with the preamble.<sup>25</sup>

### **Committee view**

4.28 During its work, the committee has considered a number of proposals for ways to achieve constitutional recognition, and conducted extensive public consultation through its public hearings and briefings. The committee has considered proposals which provide an alternative to recognition in the Constitution.

4.29 The committee has considered the proposed new section 51A and its variants, and notes the complexity involved in altering the current power of the Commonwealth by employing a 'persons power', 'subject matter power' or 'purposive power'. After extensive discussion with the community and with constitutional law experts, the committee considers that there are three options to be considered to be put forward to referendum which would deliver constitutional recognition and a relevant head of power:

- (a) Option 1: Proposed new section 51A as put forward by the committee
  - the committee has reported that because of the negativity surrounding the word 'advancement', and the potential for unintended legal interpretation of the word, that the preambular statement containing that word be removed from the Expert Panel's proposed new section 51A.
- (b) Option 2: Proposed new section 80A
  - proposed new section 80A would deliver constitutional recognition through the use of preambular language and a subject matter power. The committee notes that proposed new section 80A contains an alternative head of power which draws upon a 'persons

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24 Submission 97, p. 11.

25 Submission 97, p. 12.

power', but does not contain the clause 'for the peace, order and good government' as proposed new section 60A does.

(c) Option 3: Proposed new section 60A:

- proposed new section 60A would express the significant and unique role of Aboriginal and Torres Strait Islander peoples in Australia, and finally recognise in the Constitution the historical fact that Aboriginal and Torres Strait Islander peoples have lived on the continent now known as Australia for tens of thousands of years. As a 'persons power', the section would negate the need to list all subjects on which the Commonwealth may wish to legislate as would be required in a 'subject matter power'.
- The committee considers that the wording put forward in proposed new section 60A would express the desires of the Australian public, but would also contain this expression to one section. In arriving at this position, the committee has had regard to evidence from constitutional law experts on the risks associated with a preamble to achieve constitutional recognition. A discussion of a proposed preamble is below.

### **Alternative models**

4.30 A number of alternative models were proposed to the committee in submissions and at public hearings, briefings and correspondence.

4.31 These models will be discussed below, and include:

- a preamble;
- the proposal for an Indigenous Advisory Council;
- the proposal for a Declaration of Recognition; and
- other proposals put forward by submitters to the committee.

### **Preamble**

4.32 In its Interim Report, the committee considered recognition of Aboriginal and Torres Strait Islander peoples in a preamble to the Constitution. The committee drew on the work of the Expert Panel, which had recommended that rather than a preamble or opening statement, that preambular language be used in the body of the Constitution.<sup>26</sup>

4.33 The committee has considered the concerns raised during its inquiry into the unintended consequences of a preamble which recognises Aboriginal and Torres Strait Islander peoples. The committee heard that the insertion of a preamble or opening statement may be problematic and create legal uncertainty. However, the committee notes the advice of Justice Stephen Gageler, who commented that the role of

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26 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Interim Report*, July 2014, p. 21.

preambles is well defined in the Australian legal system.<sup>27</sup> Mr Ian Brown, the president of the Queensland Law Society, was supportive of the insertion of a preamble, and highlighted its symbolic role as a positive aspect:

...successfully inserting a preamble would be a tangible and important gesture towards full constitutional recognition. We consider that the preamble should be contained within the Constitution before Chapter 1, and this will ensure the preamble's symbolic role and rightly place recognition as a key aspect of the Constitution generally.<sup>28</sup>

4.34 The committee heard evidence that recognition of Aboriginal and Torres Strait Islander peoples in a preamble, without substantive reform, would be seen as tokenistic, not only by Aboriginal and Torres Strait Islander peoples, but also by the wider community.<sup>29</sup>

4.35 In its Interim Report, the committee reported on the option of an opening or introductory statement. As noted in that report, the language used in the preamble to the Constitution of the Republic of South Africa was considered by the committee as an example of the wording which could be used in an Australian context:

We, the people of Australia:

Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters; and

Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

Acknowledging our collective history and shared future;

Honouring those who have fought for justice and freedom;

Respecting those who have worked to build, develop and protect our country;

Commit ourselves to this Constitution.<sup>30</sup>

4.36 Professors Davis and Williams have considered the role of a preamble, noting that there is already a preamble to the Constitution contained in the *Commonwealth of Australia Constitution Act 1900*, the act of the British Parliament which brought the Australian Constitution into force.

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27 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Interim Report*, July 2014, pp 21-22.

28 *Committee Hansard*, 30 June 2014, p. 7.

29 *Committee Hansard*, 23 July 2014, p. 9; *Committee Hansard*, 14 August 2014, p. 17; *Committee Hansard*, 19 August 2014, p. 15; *Committee Hansard*, 9 September 2015, p. 15; *Committee Hansard*, 10 September 2014, p. 2; *Committee Hansard*, 13 November 2014, p. 1.

30 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Interim Report*, July 2014, p. 26.



4.37 The committee notes that in 1999, at the Constitutional Convention on a proposed republic, the possibility of a new preamble was discussed. The proposed preamble was written to 'express shared Australian values and history'<sup>31</sup> and was criticised upon its release for being 'sexist and giving insufficient recognition to Indigenous Australians'.<sup>32</sup> The referendum was not successful on the question of a republic or the insertion of a preamble.

4.38 Professors Davis and Williams refer to the 1999 discussions around a preamble, noting:

...it was, and remains, unclear whether the Australian people can change these words via a referendum, or whether any such change must be made by the British Parliament.<sup>33</sup>

4.39 Further, they raised concerns regarding the addition of a second preamble, including the question of the potential relationship between the two.<sup>34</sup>

### ***Committee view***

4.40 The committee considered the argument that a preamble could contain constitutional recognition and therefore limit its effect on the interpretation of the main body of text; however, the committee has heard evidence that puts this claim into question. In particular, the committee received legal advice which argued that constitutional recognition in a preamble would allow the content to be used in judicial interpretation for the main body of text.<sup>35</sup>

4.41 In light of this risk, the committee considers that the use of preambular language in a new section of the Constitution would better constrain the potential for its use in judicial interpretation.

### ***An Indigenous Advisory Council***

4.42 The Cape York Institute has led a proposal advocating that an advisory council made up of Aboriginal and Torres Strait Islander peoples be formed to provide advice to the parliament.<sup>36</sup> The Cape York Institute argued that 'Indigenous

31 G. Williams & D Hume, *People Power: The History and Future of the Referendum in Australia*, UNSW Press, 2010, p. 184.

32 G. Williams & D Hume, *People Power: The History and Future of the Referendum in Australia*, UNSW Press, 2010, pp 184-185.

33 M. Davis & G. Williams, *Everything you need to know about the referendum to recognise Indigenous Australians*, NewSouth Publishing, Sydney, 2015, pp 94-95.

34 M. Davis & G. Williams, *Everything you need to know about the referendum to recognise Indigenous Australians*, NewSouth Publishing, Sydney, 2015, p. 95.

35 Mr Bret Walker SC, *Constitutional recognition of Indigenous Australians: Opinion*, July 2011, p. 7; See also: University of Melbourne, *Fact Sheet 1.7: Australia's Constitutional Preamble*, p. 2, [www.law.unimelb.edu.au/files/dmfile/fact1-71.doc](http://www.law.unimelb.edu.au/files/dmfile/fact1-71.doc) (accessed 7 April 2015).

36 *Submission 38*. This model was discussed by the Expert Panel in their report, see: *Recognising Aboriginal and Torres Strait Islander peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 94.

constitutional recognition should guarantee Indigenous people a better say in the nation's democratic processes with respect to Indigenous affairs'.<sup>37</sup>

4.43 Mr Noel Pearson, Chair of the Cape York Institute, said that in there was a need for the voices of Aboriginal and Torres Strait Islander peoples to be heard:

Top down government measures do not work. Indigenous people live the Indigenous predicament. It is we who are best placed to provide the solutions to the problems that confront us.<sup>38</sup>

4.44 Mr Pearson explained that the advisory council could provide a way for the voices of Aboriginal and Torres Strait Islander peoples to be heard, and could be established through the insertion of a new chapter 1A into the Constitution:

The new Chapter could establish an Indigenous body to advise Parliament on matters relating to Indigenous peoples. This could be a procedural amendment, in keeping with the nature of the Constitution as a practical and pragmatic charter of government; a rule book which manages important national power relationships and establishes a federal framework which tempers the tyranny of the majority.<sup>39</sup>

4.45 Support for the idea was expressed by Professor Cheryl Saunders, who praised the proposal's novel approach to the topic of constitutional recognition:

In my view, this is a helpful and constructive proposal, offering a new and quite different approach to constitutional recognition, which has some potential to be both effective and broadly acceptable. It fits with the distinctive focus of the Australian Constitution on institutions and the organisation of power as the principal tools for ensuring compliance with principles of constitutionalism.<sup>40</sup>

#### *Advice to parliament*

4.46 At a briefing to the committee, Mr Pearson said that the body would provide advice to the parliament:

...we propose that an advisory body be established, as a chapter in the Constitution, that would produce advice to the parliament and oblige the parliament to table it, by the Prime Minister or through some other mechanism, in both houses, and that we have legislation that would give form and function to this body.<sup>41</sup>

4.47 The Cape York Institute further explained that the proposed new body would not need to be binding on the parliament:

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37 *Submission 38, Supplementary submission 2*, p. 4.

38 *Submission 38, Supplementary submission 2*, p. 9.

39 *Submission 38*, p. 15.

40 *Submission 136*, p. 1.

41 *Committee Hansard*, 19 December 2014, p. 24.

...the procedure in the new Chapter could be drafted such that the advice of the Indigenous body is highly persuasive and authoritative, but not binding on Parliament. It would not constitute a veto over Parliament's law making. It would therefore not derogate from parliamentary sovereignty in any way. It need not create an unwieldy bureaucracy; rather, it would enhance Indigenous participation in democracy. This proposed structure is about democracy, not bureaucracy.<sup>42</sup>

4.48 Dr Fergal Davis advised the committee that while it may not be binding on the parliament, it would require parliament to articulate the reasons why it may or may not accept the body's advice:

A representative body – correctly constituted – could deliver meaningfully for Indigenous Australians. Undoubtedly such a body would lack legal authority – its advice is non-binding – but it could have political authority.<sup>43</sup>

#### *Design of the Indigenous Advisory Council*

4.49 The Cape York Institute set out the principles they argue should be taken into consideration for the drafting of proposed new chapter 1A. The Cape York Institute suggests that in drafting the new chapter:

- it is handsome and elegant: it provides a meaningful constitutional Chapter that Indigenous people can believe in;
- it provides a real, detailed procedure for Parliament to follow;
- it is non-justiciable: it does not transfer power to the courts (but it should not contain an unattractive 'non-justiciable' or 'no legal effect' style clause) and it therefore does not diminish parliamentary sovereignty;
- it is efficient: the procedure should not slow down or hold up the machinery of Parliament;
- it is not open to abuse: Parliament must keep running if no advice is delivered by the body on a particular law; and
- it is certain and clear: it is precise enough to be understood easily by all parties.<sup>44</sup>

4.50 The proposal was supported by Professor Marcia Langton in her submission, and by the Yothu Yindi Foundation.<sup>45</sup> It was supported by Tasmanians For Recognition at a public hearing, who suggested that it be made up of a range of age-groups, particularly young people, as 'younger generations are the ones that will

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42 *Submission 38*, p. 15.

43 *Submission 135*, p. 2.

44 *Submission 38, Supplementary submission 2*, pp 24-25.

45 *Submission 81*, p. 6; *Submission 112*, p. 2.

inherit this change, and they also make up about a third of the electorate, and they need to be in that group'.<sup>46</sup>

4.51 Submissions received from Professor George Williams AO and Dr Gabrielle Appleby said that the proposal would benefit from further development and consideration of any potential risks.<sup>47</sup> Professor Williams noted that as with other proposals, 'careful scrutiny and analysis' would be beneficial to its development, and suggested that it be coupled with a protection from racial discrimination in order to strengthen its role:

The body would have something in the Constitution to advise on, that is, whether a law made by Parliament might be seen as discriminating adversely against Aboriginal people. It would give the body a meaningful role, and Parliament would be minded to listen to the body on this question given the possibility that the issue might be tested in the High Court.<sup>48</sup>

4.52 Dr Appleby suggested that the idea be discussed further at constitutional conventions, if they were held.<sup>49</sup>

4.53 The submission from Allens supported the idea of an advisory council and put forward the wording of a proposed new section 51B, to follow on from the proposed new section 51A as in Option 1 of the committee's Progress Report:

**51B First Peoples Council**

There shall be a First Peoples Council established by Parliament and with such powers as may be determined by Parliament from time to time. Parliament shall consult with and seek advice from the First Peoples Council on legislation relating to Aboriginal and Torres Strait Islander peoples.<sup>50</sup>

4.54 According to Allens, the advisory council would be a means of communication between the parliament and Aboriginal and Torres Strait Islander peoples and would not be legally binding on the actions of the parliament:

The purpose of the FPC [First Peoples Council] is to facilitate consultative engagement between Aboriginal and Torres Strait Islander peoples and the Parliament and to thereby to inform and improve the legislative, executive and judicial process as it may affect those peoples.<sup>51</sup>

4.55 The wording of this section was based upon section 101 of the Constitution, which provides for an Inter-State Commission to be formed, but which is not currently used:

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46 *Committee Hansard*, 13 November 2014, p. 15.

47 *Submissions 132, 133*.

48 *Submission 133*, p. 8.

49 *Submission 132*, p. 17.

50 *Submission 97*, p. 5.

51 *Submission 97*, p. 18.

### Inter-State Commission

There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.<sup>52</sup>

4.56 At a briefing to the committee, Professor George Williams AO raised concerns with the practicality of such a body within the Westminster system of government:

It may give a voice but it will not give influence, I think is the basic problem. Within a parliamentary system based on our Westminster traditions and the strictness of the party system, to have an advisory body—of which we have had many in the past—which may well provide advice, the odds of it being influential and listened to, in the context of legislation, especially, that is already in parliament just does not seem likely. In fact, if you look at other bodies in the past, they have shown that is the case.<sup>53</sup>

4.57 Professor Anne Twomey suggested that a new chapter could set out that a new body be required in the Constitution, rather than established, leaving questions over its design to be decided through legislation:

60A(1) There shall be an Aboriginal and Torres Strait Islander body, to be called the [insert appropriate name, perhaps drawn from an Aboriginal or Torres Strait Islander language], which shall have the function of providing advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples.

(2) The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, roles, powers and procedures of the [body].

(3) The Prime Minister [or the Speaker/President of the Senate] shall cause a copy of the [body's] advice to be tabled in each House of Parliament as soon as practicable after receiving it.

(4) The House of Representatives and the Senate shall give consideration to the tabled advice of the [body] in debating proposed laws with respect to Aboriginal and Torres Strait Islander peoples.<sup>54</sup>

4.58 Professor Twomey expressed the view that the body could provide 'an active form of recognition' which would better engage with the daily issues faced by Aboriginal and Torres Strait Islander peoples. She said that it would be platform for greater consultation with Aboriginal and Torres Strait Islander peoples:

The type of constitutional amendment outlined above could not be characterised as creating an Indigenous House of Lords or reserved seats. It

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52 *Australian Constitution*, Section 101.

53 *Committee Hansard*, 19 December 2014, p. 8.

54 *Submission 131*, pp 2-3.

is about consulting Aboriginal and Torres Strait Islander peoples about laws that affect them and letting their views be heard in Parliament.

### **Committee view**

4.59 The committee heard evidence on the desire for an Indigenous advisory body which would provide advice to Parliament on legislation, and on the unintended consequences involved with the establishment of such a group.

4.60 It is the committee's view that the advisory body would benefit from wider community consultation and debate, given that it did not receive the thorough and discursive consultation of the Expert Panel's deliberations.

4.61 Further, the committee notes the significant change to the Constitution that would be required to install an advisory council, and has concerns about the way that an advisory body would operate within the Westminster system of government. It is the committee's view that the creation of such a body would require much more discussion within the community, with constitutional law experts and a much more thorough examination of the benefits and risks.

4.62 The committee notes, however, that the establishment of an advisory council in the future need not be viewed as an alternative to constitutional recognition. The committee believes that community consultation, particularly with Aboriginal and Torres Strait Islander peoples, should be conducted in order to gauge community views on the establishment of such a body, and that Aboriginal and Torres Strait Islander peoples may consider it has merit and may wish to pursue it in the future.

### ***A Declaration of Recognition***

4.63 The committee has reported previously on the proposal for a Declaration of Recognition, suggested by Mr Julian Leeser and Mr Damien Freeman.<sup>55</sup> Mr Leeser and Mr Freeman proposed that alongside constitutional change, a Declaration of Recognition be considered:

...we should rethink our approach to Indigenous recognition: instead of trying to insert some modest statement in the Constitution, we should consider adopting an Australian Declaration of Recognition, which would contain a powerful and poetic statement of the nation that Australia has become, and our aspirations for our nation's future.<sup>56</sup>

4.64 They propose the declaration as a means to avoid 'legal technicalities', while still addressing cultural issues.<sup>57</sup> The declaration would be selected by the Australian

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55 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Progress Report*, October 2014, p. 10.

56 Damien Freeman, *Constitutional Law & Public Policy: The Australian Declaration of Recognition*, <http://damienfreeman.com/constitutional-law-and-public-policy/the-australian-declaration-of-recognition/> (accessed 11 March 2015). This essay was also provided to the committee as *Submission 29*.

57 *Submission 29*, p. 3.

public before going to a referendum, and, if successful, would be used 'at all national, civic and religious occasions'.<sup>58</sup>

4.65 They assert that the declaration would be able to embody far more than constitutional change as it could include aspirational statements and values:

Such a Declaration would have far greater cultural impact, and, decoupled from the Constitution, it would have greater capacity for rhetorical flourishes, sweeping statements, and soaring poetry, than anything which the legalistic structures of Australia's Constitution must necessarily contain.<sup>59</sup>

4.66 At no longer than 300 words, they propose the declaration be selected as a result of a national competition. They draw on the process for the selection of a national flag as a precedent.

4.67 They note that the Australian Constitution is a practical, pragmatic document, rather than a statement of Australia's values, and argue that owing to this practicality, a statement of recognition would be more suited to an extra-constitutional document such as a declaration.<sup>60</sup>

4.68 Mr Noel Pearson expressed a view at a private briefing to the committee that the proposed Declaration of Recognition would be worth consideration:

I was initially not taken with the idea, but I am a big supporter of it now, for this reason: I think there is strength in the argument that a formal declaration can have a lot of moral power, especially if we make it part of the public institutional rituals of the country.

...

I am persuaded by Freeman and Leeson's argument that a declaration that is recitable by all our children in the schools, that is used on formal occasions in parliament and so on, will allow us to come up with a much more generous and handsome set of words without trimming and so on. It is like the American Declaration of Independence—it is not a constitutional document, but it has historical force.<sup>61</sup>

4.69 Mr Graham Bradley AM, a former member of the Expert Panel, has stated his support for a declaration, arguing that 'a Declaration of Recognition enacted by the Commonwealth Parliament would be a useful step towards a successful referendum'.<sup>62</sup>

4.70 The proposal for a Declaration of Recognition was supported by Australians for Constitutional Monarchy (ACM) in their submission, who suggested that the model be discussed at a constitutional convention.<sup>63</sup>

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58 *Submission 29*, p. 3.

59 *Submission 29*, p. 3.

60 *Submission 29*, p. 5.

61 *Committee Hansard*, 19 December 2014, p. 33.

62 *Submission 127*, p. 2.

4.71 At a public hearing, ACM elaborated on the model for a Declaration of Recognition, noting that while they have not formally endorsed the model, they view it as worth further consideration:

We are of the view that the Freeman-Leeser model, which has been proposed, is certainly worthy of serious consideration. We feel that it is something that is inspirational rather than dry and constitutional, and we think that that could have a significant effect in achieving the objectives, as we see them, of any proposal, without having any deleterious effects which may or may [not] eventuate from other models.<sup>64</sup>

4.72 Mr Leeser and Mr Freeman explained to the committee that their proposed declaration would have no relationship to the Constitution and would sit outside it:

3. We are, and have always been, firmly opposed to any reference to the Declaration in the Constitution;

4. The Australian Declaration of Recognition, should it be adopted by the Australian nation, would have no anchor in the Australian Constitution;<sup>65</sup>

4.73 The committee notes that although Mr Leeser and Mr Freeman's proposal did not include a reference to the declaration in the Constitution, a potential relationship between the declaration and the Constitution was explored by submitters and witnesses.

4.74 The committee received advice from Professor Williams AO which expressed the view that it would be unusual for the Constitution to refer to a declaration, as the Constitution does not mandate which laws should be enacted but rather authorises the making of laws. Professor Williams AO highlighted the potential for problems and uncertainties if the Constitution were to refer to the enactment of a particular law.<sup>66</sup> Professor Anne Twomey also expressed the view that a provision that required the Constitution to enact certain legislation would be contrary to parliamentary sovereignty.<sup>67</sup>

### **Committee view**

4.75 The committee has considered the proposal for a declaration, and heard discussion around whether it would be referred to in the Constitution or would sit outside it.

4.76 Based on its consultations and written submissions, the committee considers that a declaration of recognition which sits outside the Constitution would not be supported by the community as an alternative to constitutional recognition. The committee heard throughout its work that there is strong desire among Aboriginal and

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63 *Submission 98*, p. 15.

64 *Committee Hansard*, 20 February 2015, p. 45.

65 *Supplementary submission 29*, p. 1.

66 Professor George Williams AO, *Advice*, 29 September 2014.

67 Professor Anne Twomey, *Advice*, 30 September 2014.



Torres Strait Islander peoples for the founding document of the nation to recognise the role they play in Australia and acknowledge their position as first peoples.

4.77 The committee believes that recognition in the Constitution is of vital importance in moving towards reconciliation and that it is time to remedy the exclusion of Aboriginal and Torres Strait Islander peoples from the Constitution. The committee considers that a declaration *and* constitutional recognition has merit, as the declaration would allow an aspirational statement of values to be drafted as a parallel opportunity to recognise Aboriginal and Torres Strait Islander peoples, while constitutional recognition allows the removal of section 25 and amendment of the 'races' power.

4.78 The committee considers that a declaration would build momentum towards constitutional recognition by focussing public attention, stimulating debate and fostering a higher level of engagement through the option of a public competition for the wording of the declaration.

### ***Model of self-governance***

4.79 Mr John Grogan argued that the following suggestions be considered as an alternative to the recommendations of the Expert Panel:

Add in the Constitution a power over land tenure

In relation to recognition, reconciliation, self-determination and political sovereignty adopt a municipal model of self government, in compliance with a UN Covenant under s.51(xxix) which has already been adopted.

In relation to cultural and economic sovereignty it is suggested to adopt a 'corporate' model (trusts, private companies) to generate income for members and to allow for cultural promotion through language specific radio stations, education etc (s.51(xx)).<sup>68</sup>

### ***Council of Indigenous Elders***

4.80 Ms Jennifer Symonds put forward several suggestions for the committee to consider options to:

3. adapt the Senate to become, or to include a Council of Indigenous Elders so as to create a political voice for Indigenous Australians

4. include the original geographical divisions of Indigenous nations, either in addition to, or instead of, the states & territories.<sup>69</sup>

### ***Treaty-making power***

4.81 A submission was received from Mr Moyle AM, Mr Moore & Mr Botsman which suggested that the Expert Panel recommendations be accepted in the main, but also put forward some further measures, including:

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<sup>68</sup> Submission 73, p. 48.

<sup>69</sup> Submission 85, p. 2.

...a Constitutionally-backed Treaty-making power that would allow binding treaties with Aboriginal and Torres Strait Islander Peoples and that, once ratified by Parliament, would have the full force of law;<sup>70</sup>

### ***Reserved seats in the Senate***

4.82 The submission from Mr Moyle AM, Mr Moore & Mr Botsman also promoted the idea of reserved seats in the Senate for representatives of Aboriginal and Torres Strait Islander communities. They specifically advocated setting aside:

...two seats in the Senate dedicated to democratically elected representatives of the Aboriginal and Torres Strait Islander Peoples, with elected Senators having the same rights, duties and privileges as all other Senators;<sup>71</sup>

### ***Statement of values***

4.83 The Humanist Society of Victoria suggested that a Statement of Values be considered:

We strongly support the addition of a Statement of Values. As well as recognising Australia's First Peoples, it should also set out Australia's fundamental values: racial, sexuality and gender-identity equality, respect for cultural diversity, personal freedoms, the rule of law, equal opportunity and democratic governance. This is of special importance in the absence of a National Bill of Rights.<sup>72</sup>

### ***Amendment of section 51(xxvi) – the 'races' power***

4.84 A submission from Mr Patrick Govey proposed minimal change to the Constitution, by recommending that section 51(xxvi) be amended as follows:

(The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:)

(xxvi) The people of any race for whom it is deemed beneficial for those people to make special laws.

A law will not be beneficial unless it is established that it is beneficial.<sup>73</sup>

### ***Committee view***

4.85 The committee has given due consideration to the recommendations and discussions of the Expert Panel throughout its inquiry to achieve recognition of Aboriginal and Torres Strait Islander peoples. The committee has considered the proposals which were put forward by submitters and witnesses.

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70 *Submission 3*, p. 3.

71 *Submission 3*, p. 3.

72 *Submission 43*, p. 2.

73 *Submission 69*, p. 1.

4.86 The committee has spent considerable time discussing the proposals put forward by submitters and witnesses and believes that the debate generated around the topic of recognition and how best to achieve it has been able to stimulate a national discussion on the topic. The alternative models discussed above do not support the goal of constitutional recognition, although they can be seen to address models for engagement and reconciliation.

4.87 Where the committee has made its recommendations, it has done so with regard to the four motivating factors outlined in Chapter 2 of this report, particularly that constitutional recognition would complete the Constitution and that any proposal must have the support of Aboriginal and Torres Strait Islander peoples. At this stage, the evidence to the committee does not suggest that there is broad support for any of the alternative models as outlined briefly above.

## **Recommendation 5**

**4.88 The committee recommends that the three options, which would retain the persons power, set out as proposed new sections 60A, 80A and 51A & 116A, be considered for referendum.**

**4.89 The first option the committee recommends for consideration is its amended proposed new section 51A, and proposed new section 116A, reported as option 1 in the committee's Progress Report:**

### **51A Recognition of Aboriginal and Torres Strait Islander Peoples**

**Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;**

**Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;**

**Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;**

**The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.**

### **116A Prohibition of racial discrimination**

**(1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.**

**(2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group;**

**4.90 The committee considers that this proposal:**

- is legally and technically sound;**
- retains a persons power as per the 1967 referendum result;**

- contains a special measures provision;
- limits the constitutional capacity of the Commonwealth, states and territories to discriminate;
- offers a protection for all Australians;
- is a broad option;
- had the overwhelming support of Aboriginal and Torres Strait Islander peoples and non-Aboriginal and Torres Strait Islander peoples during the inquiry; and
- accords with the recommendation of the Expert Panel.

**4.91** The second option was proposed by Mr Henry Burmester AO QC, Professor Megan Davis and Mr Glenn Ferguson after their consultation process:

### **CHAPTER IIIA**

#### **Aboriginal and Torres Strait Islander Peoples**

##### **Section 80A**

- (1)** Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

**Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;**

**Respecting the continuing cultures and heritage of Aboriginal and Torres Strait Islander peoples;**

**Acknowledging that Aboriginal and Torres Strait Islander languages are the original Australian languages and a part of our national heritage;**

**the Parliament shall, subject to this Constitution, have power to make laws with respect to Aboriginal and Torres Strait Islander peoples, but so as not to discriminate against them.**

- (2)** This section provides the sole power for the Commonwealth to make special laws for Aboriginal and Torres Strait Islander peoples.

**4.92** The committee considers that this proposal:

- is legally and technically sound;
- retains a persons power as per the 1967 referendum result;
- is clear in meaning;
- limits the capacity of the Commonwealth only with regard to discrimination, so states and territories are not affected by constitutional change;
- is a narrow option; and

- offers constitutional protection from racial discrimination for Aboriginal and Torres Strait Islander peoples.

**4.93** The third option which would retain the persons power is the proposal from the Public Law and Policy Research Unit at the University of Adelaide:

**60A Recognition of Aboriginal and Torres Strait Islander Peoples**

**Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;**

**Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;**

**Respecting the continuing cultures and heritage of Aboriginal and Torres Strait Islander peoples;**

**Acknowledging that Aboriginal and Torres Strait Islander languages are the original Australian languages and a part of our national heritage;**

- (1) The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.**
- (2) A law of the Commonwealth, a State or a Territory must not discriminate adversely against Aboriginal and Torres Strait Islander peoples.**

**4.94** The committee considers that this proposal:

- is legally and technically sound;
- retains a persons power as per the 1967 referendum result;
- is clear in meaning;
- is both a narrow and a broad option;
- limits the 'adverse discrimination' provision to Aboriginal and Torres Strait Islander peoples; and
- limits the capacity of the Commonwealth, states and territories constitutionally to discriminate.



## Chapter 5

### A proposed prohibition of discrimination

5.1 During its inquiry, the committee found that there is broad consensus among the Australian community that discrimination on the basis of race is unacceptable. The committee acknowledges concerns, however, over how this consensus is applied. The committee is of the strong belief that discrimination on the basis of race should have no place in modern Australia, nor in the decisions of its parliament. It is the view of the committee that the central question is how this is best achieved.

5.2 This chapter will set out the arguments put to the committee which support a prohibition of discrimination, and discusses the evidence concerning its narrow, or broad, application. The committee heard evidence at its public hearings on the desire for a protection from racial discrimination. The committee also heard concerns from a small number of witnesses and submitters on the potential risks of a prohibition of discrimination enshrined in the Constitution. This chapter will set out those concerns.

5.3 The narrow, or broad, application of a proposed prohibition of discrimination enshrined in the Constitution is an important issue for consideration. As noted above, the committee has had regard to the question of whether a constraint should be placed on the parliament's capacity to adversely discriminate on the basis of race, and how that can best be achieved. In considering this question, two options emerged as ways to achieve this:

- a broader prohibition of discrimination which would apply to all citizens, proposed by the Expert Panel in the form of proposed new section 116A and considered previously by the committee; or
- a prohibition of racial discrimination which would apply only to Aboriginal and Torres Strait Islander peoples, as can be seen in proposed new sections 80A and 60A.

5.4 The committee has considered carefully the two options and has considered evidence from constitutional lawyers, submitters and witnesses in forming its views. The committee notes the overwhelming support from witnesses and submitters for a prohibition of discrimination forming part of constitutional recognition in some form, and discusses the options below.

5.5 The committee notes the work of the Expert Panel on the insertion of a racial non-discrimination clause into the Constitution. The Expert Panel, in its report, set out that legal advice provided to them suggested that a prohibition of racial discrimination would be legally sound.<sup>1</sup>

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1 *Recognising Aboriginal and Torres Strait Islander peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 171.

### ***A prohibition of racial discrimination against Aboriginal and Torres Strait Islander peoples***

5.6 In Chapter 4, the committee discussed proposals for new sections to recognise Aboriginal and Torres Strait Islander peoples in the Constitution. Three proposed new sections were considered in detail, which are a variation on the proposed new section 51A as put forward by the Expert Panel.

#### ***Proposed new section 80A***

5.7 The proposal provided by Henry Burmester AO QC, Megan Davis and Glenn Ferguson, following their consultation with lawyers around Australia, included a protection against racial discrimination to be applied to Aboriginal and Torres Strait Islander peoples:

the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to protecting the cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples [including their traditional connection to land and waters], and in order to overcome disadvantage or ameliorate the effects of past discrimination against them.

- (1) This section provides the sole power for the Commonwealth to make special laws for Aboriginal and Torres Strait Islander peoples.

#### **Alternative formulations for head of power**

...power to make laws...with respect to Aboriginal and Torres Strait Islander peoples, but so as not to discriminate against them.<sup>2</sup>

5.8 The committee notes the wording 'but not so as to discriminate against them' is a narrow form of protection as it only applies to Aboriginal and Torres Strait Islander peoples.

#### ***Proposed new section 60A***

5.9 Proposed new section 60A, as put forward by the Public Law and Policy Research Unit at the University of Adelaide drew upon the preambular language of proposed new section 80A, discussed above. This proposal contains a subsection which would more explicitly preclude discrimination against Aboriginal and Torres Strait Islander peoples:

(2) Laws specially applicable to Aboriginal and Torres Strait Islander peoples, whether enacted under this section or under any other provision of the Constitution, or by a State or Territory, shall not discriminate adversely against them.<sup>3</sup>

5.10 The committee notes, in this proposal, the use of the wording 'shall not discriminate adversely' and considers that the explicit prohibition of discrimination

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2 Mr Henry Burmester AO QC, Professor Megan Davis and Mr Glenn Ferguson, *Draft Alternative Constitutional Amendment*, p. 1.

3 *Submission 42*, p. 6.



against Aboriginal and Torres Strait Islander peoples is an important aspect of constitutional recognition.

5.11 The committee considered the wording 'shall not discriminate adversely' in its Progress Report, and put forward an option for a re-drafted proposed new section 51A which included this wording.<sup>4</sup>

***A prohibition of racial discrimination against all citizens***

5.12 In this section, a broader prohibition of racial discrimination to protect all citizens is discussed. A broad prohibition of discrimination was recommended by the Expert Panel in the form of proposed new section 116A. Although this proposed new section would be separate to a proposed new section which recognises Aboriginal and Torres Strait Islander peoples, it has been discussed as a second strand of constitutional recognition. The committee notes that there has been no discussion suggesting the insertion of proposed new section 116A without a section to achieve constitutional recognition.

5.13 In its report, the Expert Panel recommended that the following section outlining a prohibition of racial discrimination be included in the Constitution:

**116A Prohibition of racial discrimination**

(1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.

(2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group;<sup>5</sup>

5.14 The Interim Report of this committee discussed whether a prohibition of discrimination should be included in the Constitution, and whether that inclusion would 'preclude legislative override of any judicial decision that was consequent on the amendment'.<sup>6</sup>

5.15 The committee notes its previous discussion around a prohibition of discrimination in its Progress Report.<sup>7</sup> The committee reported that a prohibition of discrimination was viewed as real and substantive constitutional change by Aboriginal and Torres Strait Islander peoples. Mr Mark Liebler AC told the committee that, during the work of the Expert Panel, the question of a prohibition of discrimination was raised consistently:

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4 Option 2, Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Progress Report*, October 2014, p. 8.

5 *Recognising Aboriginal and Torres Strait Islander peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 173.

6 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Interim Report*, July 2014, p. 16.

7 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Progress Report*, October 2014, pp 5-6.

At every single consultation that we held, there was a reference to substantive recognition—'We want substantive recognition.' What did that mean? It turned out that substantive recognition means something to preclude racial discrimination.<sup>8</sup>

### **Support for a prohibition of racial discrimination**

5.16 A number of views regarding a provision to prohibit discrimination in the Constitution have been expressed to the committee during its inquiry. Concerns were raised regarding potential legal ramifications of such a change; however the committee notes the overwhelming Aboriginal and Torres Strait Islander and non-Aboriginal and Torres Strait Islander community support for a prohibition of discrimination to be included in the Constitution. This support was based on the following reasons:

- submitters felt that the inclusion of an anti-discrimination provision was 'essential' to the process of recognition and had strong community support;
- a prohibition of discrimination would be substantive and meaningful reform;
- it would bring the Constitution in line with racial non-discrimination laws which apply to the states and territories, and be consistent with, *Racial Discrimination Act 1975* (Cth);
- as a number of express and implied rights are already enshrined in the Constitution, the addition of a protection against discrimination should be supported; and
- a prohibition of discrimination would apply to all Australian citizens regardless of ethnic or national origin.

5.17 The committee notes that the Expert Panel also found that there was overwhelming support for a racial non-discrimination provision.<sup>9</sup>

### ***Strong community support for a prohibition of discrimination***

5.18 The committee's work has confirmed the high level of community support for a prohibition of discrimination. Overwhelmingly, submitters and witnesses were in favour of a prohibition of discrimination on the basis of race in the Constitution.<sup>10</sup> A number of submitters argued that the insertion of proposed new section 116A was

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8 *Committee Hansard*, 14 August 2014, p. 37.

9 *Recognising Aboriginal and Torres Strait Islander peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 157.

10 *Submissions* 7, 10, 35, 38, 52, 67, 95, 99, 106, 108, 115.

central to the intention to recognise Aboriginal and Torres Strait Islander peoples.<sup>11</sup> The issue has also been widely discussed in the media.<sup>12</sup>

5.19 Professor Megan Davis has highlighted the significance that a prohibition of discrimination would have for Aboriginal and Torres Strait Islander peoples:

The proclivity for parliaments in Australia to single out Indigenous communities for special and adverse treatment and the failure to take into consideration the views of Aboriginal and Torres Strait Islander peoples explains why proposals for a racial non-discrimination clause or an advisory body influencing Parliament are so compelling. Indigenous peoples lack a presence in Australian democracy.<sup>13</sup>

5.20 The Aboriginal Peak Organisations NT proposed that a:

...new provision should be inserted specifically directed at prohibiting racial discrimination. The provision should explicitly provide that any special measure must be reasonable and proportionate, and require prior consultation with the group that is the subject of the special measure.<sup>14</sup>

5.21 Associate Professor Sean Brennan, director of the Indigenous Legal Issues Project, Gilbert + Tobin Centre of Public Law, argued that a prohibition of discrimination and constitutional recognition are linked:

Given the experience of indigenous people under the constitution, the removal of unfair discrimination is an important element in providing for their constitutional recognition.<sup>15</sup>

### ***Substantive reform***

5.22 During its inquiry, the committee heard the strong view that if constitutional recognition were to be pursued, substantive reform should be achieved. Many

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11 *Submissions 7, 10, 35.*

12 Associate Professor Sean Brennan, 'It's time for our first peoples to get a fair go in the constitution', *The Age*, 17 February 2012, <http://www.theage.com.au/federal-politics/political-opinion/its-time-for-our-first-peoples-to-get-a-fair-go-in-the-constitution-20120216-1tbrl.html> (accessed 5 March 2015); David Marr, 'Poetic injustice as bid for Indigenous Recognition stalls', *The Saturday Paper*, 22 November 2014, <http://www.thesaturdaypaper.com.au/opinion/topic/2014/11/22/poetic-injustice-bid-indigenous-recognition-stalls/14165748001276> (accessed 12 March 2015).

13 Megan Davis, 'Political timetables trump workable timetables: Indigenous constitutional recognition and the temptation of symbolism over substance' [online]. *Indigenous Law Bulletin*, Vol. 8, No. 15, Dec 2014: 6-10, p. 10.

14 *Submission 116*, p. 2. The Aboriginal Peak Organisations NT is made up of Northern Land Council (NLC), Central Land Council (CLC), Aboriginal Medical Services Alliance Northern Territory (AMSANT), North Australian Aboriginal Justice Agency (NAAJA) and Central Australian Aboriginal Legal Aid Service (CAALAS).

15 Associate Professor Sean Brennan, *It's time for our first peoples to get a fair go in the constitution*, 17 February 2012, <http://www.theage.com.au/federal-politics/political-opinion/its-time-for-our-first-peoples-to-get-a-fair-go-in-the-constitution-20120216-1tbrl.html> (accessed 5 March 2015).

witnesses rejected the idea of mere recognition, considering it to be 'tokenistic'.<sup>16</sup> The committee heard that for it to be supported, recognition had to be combined with a provision preventing discrimination on the basis of race.

5.23 Professor Megan Davis has stated that without a substantive amendment to the Constitution, Aboriginal and Torres Strait Islander peoples may not support a referendum.<sup>17</sup>

5.24 In a similar vein, ANTaR, in their submission, argued that for constitutional recognition to be meaningful, the insertion of a prohibition of racial discrimination was essential:

ANTaR notes that Aboriginal and Torres Strait Islander People have been calling for meaningful and substantive reform. Essential to the discussion of substantive reform is the inclusion of the proposed 116A Prohibition of Racial Discrimination. ANTaR maintains that this recommendation is an essential element to this reform process.<sup>18</sup>

5.25 Oxfam Australia echoed the view that a prohibition of discrimination, through the insertion of proposed new section 116A, is essential:

Such amendments would ensure consistency as recognition without such measures concerning racial discrimination is generally recognised to be hollow. Aboriginal and Torres Strait Islander Peoples have been calling for meaningful and substantive reform to the constitution for many years.<sup>19</sup>

5.26 Reconciliation Victoria confirmed the desire for a substantive protection against racial discrimination:

We have found from our consultation and community engagement over the last 18 months with Aboriginal and Torres Strait Islander peoples, interfaith, CALD communities and the broader population living in Victoria that without substantive constitutional reform, recognition will be seen as tokenistic, symbolism is not enough.<sup>20</sup>

5.27 At public hearings, witnesses expressed their desire to see the inclusion of a prohibition on racial discrimination included in the Constitution. When the committee was in the Torres Strait, it heard that it would contribute to a deep sense of pride for Torres Strait Islanders if constitutional recognition could deliver a prohibition of discrimination on the basis of race and which would apply to all citizens.

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16 *Committee Hansard*, 30 June 2014, p. 13; *Committee Hansard*, 21 July 2014, p. 4, p. 15, p. 19, p. 22; *Committee Hansard*, 22 July 2014, p. 2; *Committee Hansard*, 14 August 2014, p. 7, p. 20, *Committee Hansard*, 19 August 2014, p. 16; *Committee Hansard*, 10 September 2014, p. 21; 6 November 2014, p. 21; *Committee Hansard*, 20 February 2015, p. 18, p. 24, p. 30.

17 Megan Davis, 'Political timetables trump workable timetables: Indigenous constitutional recognition and the temptation of symbolism over substance', *Indigenous Law Bulletin*, Vol. 8, No. 15, Dec 2014: 6-10, p. 10.

18 *Submission 7*, p. 6.

19 *Submission 10*, p. 5.

20 *Submission 35*, p. 1.

5.28 Professor Patrick Dodson expressed the view that without a prohibition of discrimination, constitutional recognition would lack meaning to Aboriginal and Torres Strait Islander peoples.<sup>21</sup>

5.29 Professor Patrick Dodson said during the Lowitja O'Donoghue Oration in 2014 that racial non-discrimination was a significant aspect of recognition:

We also proposed that as a modern democracy our Constitution should provide a guarantee against racial discrimination. To that end, we proposed that a new Section 116A on non-discrimination should also be adopted. Such a provision would prohibit the Commonwealth, State and Territories Governments from passing laws that discriminate against people on the basis of their race, ethnicity or nationality...There is clear and compelling logic of how these proposals fit together as two halves of the whole – the recognition of Aboriginal and Torres Strait Islander peoples and non-racial discrimination against any citizen.

You can't have the recognition of Aboriginal and Torres Strait Islander peoples and then maintain the ability of the Commonwealth to racially discriminate against us.<sup>22</sup>

### ***Racial non-discrimination in existing Commonwealth and state law***

5.30 The primary legislation governing racial discrimination in Australia is the *Racial Discrimination Act 1975* (Cth) (RDA), which establishes that discrimination on the basis of national or ethnic origin is unlawful. Section 9 of the RDA provides that:

#### **9 Racial discrimination to be unlawful**

(1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.<sup>23</sup>

5.31 Section 10 of the RDA confirms that the protection against racial discrimination applies to federal, state and territory laws.<sup>24</sup>

5.32 The committee noted the Expert Panel's finding that, owing to the operation of the RDA, the states and territories are already subject to a prohibition of racial discrimination:

By operation of the Racial Discrimination Act and section 109 of the Constitution, the States and Territories are already effectively subject to a

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21 *Committee Hansard*, 21 July 2014, p. 22; Mark Leibler, 'Constitutional change pointless without Aborigines' support', *The Weekend Australian*, 20 September 2014, p. 20.

22 Professor Patrick Dodson, 'Rights, recognition and reconciliation', *The Lowitja O'Donoghue Oration 2014*, 27 May 2014, p. 10.

23 *Racial Discrimination Act 1975* (Cth), s9(1).

24 *Racial Discrimination Act 1975* (Cth), s10(1).

constitutional prohibition on legislative or executive action which discriminates on the ground of race.<sup>25</sup>

5.33 Section 109 sets out the relationship between state and Commonwealth law:

**Inconsistency of laws**

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

5.34 Section 109 has been the basis of a number of High Court challenges. For example, in *Western Australia v Commonwealth* (1995),<sup>26</sup> it was argued that Western Australian legislation which existed prior to the *Native Title Act 1993* (Cth) was inconsistent with the RDA because it made native title more vulnerable to extinguishment than other property rights. The Western Australian legislation was found to be invalid as it was inconsistent with the Commonwealth *Native Title Act*. The Australian Human Rights Commission noted the significance of the case:

The case ensured the survival of the Native Title Act and established that the RDA would protect native title against attempted extinguishment by State governments... The decision highlights the capacity of the RDA to protect the rights of an individual or group against discriminatory government action.<sup>27</sup>

5.35 By inserting an anti-discrimination provision into the Constitution, the Commonwealth would have to apply the same standard as is currently applied to the states and territories. Professors Davis and Williams have noted that the Commonwealth is the only level of government in Australia which can 'escape the effect of the Racial Discrimination Act'.<sup>28</sup>

5.36 At a public hearing Mr Nolan Hunter, Chief Executive Officer of the Kimberley Land Council, raised the significance of a consistent standard to be applied across states and territories, and the Commonwealth:

The point about including it in the Constitution is that you avoid the necessity or the ability to just create other legislation and repeal others. You need consistent protection, I guess, and that is the intention of looking at the Constitution as a way to maintain the strong point.<sup>29</sup>

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25 *Recognising Aboriginal and Torres Strait Islander peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 158. The committee notes that s109 of the Constitution states that federal law shall prevail over inconsistent state laws.

26 183 CLR 373.

27 Australian Human Rights Commission, *Landmark Cases under the Racial Discrimination Act 1975*, <http://www.humanrights.gov.au/guide-law-landmark-cases-under-racial-discrimination-act-1975> (accessed 11 March 2015).

28 M. Davis & G. Williams, *Everything you need to know about the referendum to recognise Indigenous Australians*, NewSouth Publishing, Sydney, 2015, p. 105.

29 *Committee Hansard*, 21 July 2014, p. 4.

5.37 The Cape York Land Council also noted their anxiety about this lack of consistency:

While the RDA can be useful when a State government passes a blatantly discriminatory law, we have seen that governments can just as easily legislate around court decisions. Court battles are expensive and time consuming. The RDA too, is just ordinary legislation and can be altered at any time. It can be suspended, as happened initially with the Northern Territory Intervention.<sup>30</sup>

5.38 The capacity for the RDA to constrain adverse discrimination on the basis of race in Commonwealth legislation is limited. Professors Davis and Williams note:

The *Racial Discrimination Act* is not capable of restricting how the federal Parliament might use any new power inserted into the Constitution. The only way of negating the possibility such a power might be used to discriminate against Indigenous people is to insert qualifying words into the Constitution itself.<sup>31</sup>

5.39 During the course of the inquiry, witnesses raised the then-proposed changes to section 18C of the RDA, which had been suggested by the Commonwealth Government. Section 18C of the RDA 'makes it illegal for someone to do a public act which is 'reasonably likely, in all the circumstances', to 'offend, insult, humiliate or intimidate' someone on the basis of their race.'<sup>32</sup> The proposed changes primarily involved an extension of the free speech provision, and would protect:

...a very much broader range of public speech, including speech which would incite racial hatred. To fall outside the proposed section's regulation the communication must simply form part of the 'public discussion' in a very broad range of categories (including, for instance, discussion of a 'political, social or cultural' matter).<sup>33</sup>

5.40 This evidence was not isolated.<sup>34</sup>

#### *Suspension of the Racial Discrimination Act 1975*

5.41 The Law Council of Australia advised the committee that the RDA has been of great significance to Aboriginal and Torres Strait Islander peoples:

Since its enactment, the RDA has been important in ensuring the protection of all Australians from racial discrimination. However, it has perhaps been

30 *Submission 94*, p. 2.

31 M. Davis & G. Williams, *Everything you need to know about the referendum to recognise Indigenous Australians*, NewSouth Publishing, Sydney, 2015, p. 105.

32 K. Magarey, Australian Parliamentary Library, 'The Attorney-General's suggested changes to the Racial Discrimination Act 1975', *Research Paper Series 2013-14*, 5 June 2014, p. 3.

33 K. Magarey, Australian Parliamentary Library, 'The Attorney-General's suggested changes to the Racial Discrimination Act 1975', *Research Paper Series 2013-14*, 5 June 2014, p. 1.

34 For example, see: Ms Deb Chapman, *Committee Hansard*, 14 August 2015, p. 9; Ms Hyllus Munro, *Committee Hansard*, 21 February 2015, p. 6; Ms Dierdre Robertson, *Committee Hansard*, 13 August 2014, p. 8.

more critical for Indigenous Australians than any other group in Australian society. The RDA has been used by many Indigenous Australians to protect their rights against discrimination by governments, organisations and individuals.<sup>35</sup>

5.42 While the RDA has been used for the protection of Aboriginal and Torres Strait Islander peoples, the committee notes that the RDA has only ever been set aside so that the Commonwealth could give effect to legislation that would otherwise be discriminatory to Aboriginal and Torres Strait Islander peoples.<sup>36</sup>

5.43 Professor Larissa Behrendt pointed out that the RDA has only ever been set aside to enact legislation that has particular regard to Aboriginal and Torres Strait Islander peoples, and has never been set aside for any other ethnic group.<sup>37</sup>

5.44 Specifically, she noted that the RDA has been set aside on the following three occasions:

- for the enactment of the *Northern Territory National Emergency Response Act 2007*;
- for the *Native Title Amendment Act 1998*; and
- in relation to the Hindmarsh Island Bridge dispute.<sup>38</sup>

5.45 The Australian Human Rights Commission has argued for the need to enshrine the right to freedom from racial discrimination in the Constitution:

The Australian Constitution has failed to protect Aboriginal and Torres Strait Islander rights as the first peoples of this country. For example, the Racial Discrimination Act 1975 (Cth) (RDA) has been compromised on three occasions: each time it has involved Aboriginal and Torres Strait Islander issues.<sup>39</sup>

*Special measures exemption in the Racial Discrimination Act 1975 (Cth)*

5.46 The *Racial Discrimination Act 1975* includes an exception for special measures, which are actions taken to ensure certain racial groups have full and equal enjoyment of human rights. Special measures are those laws enacted for the benefit of

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35 Law Council of Australia, *Suspension of the Racial Discrimination Act 1975*, <http://www.lawcouncil.asn.au/lawcouncil/index.php/ct-menu-item-62/ct-menu-item-138/ct-menu-item-156> (accessed 19 March 2015).

36 *Submission 18*, p. 21; *Submission 34*, pp 5-6; *Submission 45*, p. 3, fn 6;

37 Prof. Larissa Behrendt, *60 years of the Declaration of Human Rights*, <http://www.amnesty.org.au/about/comments/22338> (accessed 19 March 2015).

38 Prof. Larissa Behrendt, *60 years of the Declaration of Human Rights*, <http://www.amnesty.org.au/about/comments/22338> (accessed 19 March 2015).

39 Australian Human Rights Commission, *Constitutional reform: Fact Sheet - Recognising Aboriginal & Torres Strait Islander people in the Constitution*, <https://www.humanrights.gov.au/publications/constitutional-reform-fact-sheet-recognising-aboriginal-torres-strait-islander-people> (accessed 19 March 2015).



a racial group to overcome disadvantage or past discrimination. Therefore, an action will not be racially discriminatory if it is deemed to be a special measure.

5.47 Special measures originate in international law, and are defined in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which came into force on 4 January 1969.<sup>40</sup>

5.48 Article 1 (4) of the ICERD sets out the definition of special measures, but adds a caveat. It states that special measures will not be deemed racially discriminatory:

...provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.<sup>41</sup>

5.49 On this basis, for an action to be considered a 'special measure', it has to fulfil the following criteria:

- the measure or measures must have the sole purpose of securing the advancement of certain groups;
- the measure or measures must be necessary; and
- they are 'catch-up' measures which must cease when they have served their purpose of advancing the disadvantaged group.<sup>42</sup>

5.50 Legal advice provided to the committee considered whether an anti-discrimination provision would invalidate special measures,<sup>43</sup> and the effects of a prohibition of discrimination in the Constitution on special measures were discussed by constitutional lawyers during a briefing to the committee.<sup>44</sup>

5.51 In its Progress Report, the committee noted that the option for special measures 'would not limit the legislative power of state and territory parliaments'.<sup>45</sup> However, since that report was tabled, the committee has considered further advice on this issue.

5.52 Professor Anne Twomey raised issues with the proposed new section 116A with regard to special measures:

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40 Convention on the Elimination of all forms of Racial Discrimination (CERD) Article 1(4).

41 Article 1(4).

42 McRae, Nettheim et al, *Indigenous Legal Issues*, Thomson Reuters, 2009, pp 471-472.

43 Mr Stephen Lloyd SC and Mr David Hume, *Opinion on the effect of proposed amendments to the commonwealth constitution on certain commonwealth laws*, p. 3; Mr Henry Burmester AO QC and Professor Megan Davis, *Amendments to the Constitution in relation to Indigenous recognition: Preliminary Advice* p. 19; *Committee Hansard*, 19 December 2014.

44 *Committee Hansard*, 19 May 2014.

45 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Progress Report*, October 2014, pp 8-9.

One concern is that, if you look at any of the versions in here, including the section 116A, it does not incorporate, even in its subsection (ii), a special measures provision and it was the special measures provision which sustained the law in the Maloney case. Under 116A, the Maloney law would have been knocked down, as far as I can see, because it is difficult to say that that is a law concerning overcoming the effects of past discrimination or promoting cultures, languages or heritage. I think that that is a real issue.<sup>46</sup>

5.53 In the case of *Maloney v. The Queen*,<sup>47</sup> it was claimed that laws which restricted the possession of alcohol in the community area of Palm Island Shire Council were discriminatory owing to the area's high Aboriginal and Torres Strait Islander population. As the restriction was considered by the court to be a special measure, the appeal was dismissed.

5.54 Professors Davis and Williams explain that the provision contained in subsection (2) of proposed new section 116A would enable funding to continue to be provided to overcome disadvantage, for example, with regard to health or education.<sup>48</sup>

### ***Rights already enshrined in the Constitution***

5.55 Support for the insertion of an anti-discrimination provision in the Constitution was also based on a view that the Constitution already contains a number of rights, so the addition of the right to protection from racial discrimination would not be unprecedented.

5.56 Dr Bede Harris noted that the Constitution already contains a number of rights and argued that the insertion of a protection against racial discrimination would add to those already enshrined:

Since its inception, our Constitution has contained a number of express rights, and the courts have had the power to declare invalid legislation which infringes those rights. The insertion of a new right into the Constitution would therefore serve only to add one more right to those which already exist – it would not confer a new power on the courts. Those who object to the inclusion of a right not to be discriminated against on grounds of race ought, if they are to be consistent, advocate the removal from the Constitution of the rights it already protects – which would obviously be unacceptable.<sup>49</sup>

5.57 The Australian Constitution already enshrines a number of express and implied rights. The Constitution includes a small number of express rights regarding

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46 *Committee Hansard*, 19 May 2014, p. 12.

47 *Maloney v. The Queen*, B57/2012.

48 M. Davis & G. Williams, *Everything you need to know about the referendum to recognise Indigenous Australians*, NewSouth Publishing, Sydney, 2015, p. 106.

49 *Submission 106*, pp 2-3.

voting, the protection of property, freedom of trade and movement, trial by jury, freedom of religion and the prohibition of discrimination based on State residence.<sup>50</sup>

5.58 The High Court has largely applied a strict literal interpretation of civil and political rights, reducing their operation to mere procedural requirements rather than serving as substantive civil or political protections. The committee notes that in contrast, economic rights, particularly in relation to the right to just terms compensation for the acquisition of property, have been applied robustly and often, and that more substantive protections in the Constitution have emerged through the jurisprudence of implied rights.<sup>51</sup>

5.59 The most established of these implied rights is the freedom of political communication, which arises as a necessary implication from the system of representative government.<sup>52</sup> However, the protection this affords is circumscribed, as limiting political communication is permissible if it is reasonably appropriate and adapted to do so in accordance with a legitimate end.<sup>53</sup> As the implied rights do not operate as free-standing or clearly defined prohibitions, the extent of their protection is necessarily limited.

### ***Protection for all citizens***

5.60 Professors Davis and Williams have discussed support for a general prohibition of racial discrimination applying to everyone:

...it is generally accepted that no person should be subjected to racial discrimination, and so not granting protection to the community at large may lessen support for the referendum proposal as a whole. The idea that the Constitution, as part of recognising Australia's first peoples, should offer every person protection from racial discrimination has attracted strong public support.<sup>54</sup>

5.61 Some submitters supported a prohibition of racial discrimination applying to all Australians.<sup>55</sup> Dr Bede Harris noted the applicability of the provision beyond Aboriginal and Torres Strait Islander peoples:

In light of the above it is clear that the protection of the rights of Indigenous people from adverse legislation requires inclusion in the Constitution of a right not to be subject to racial discrimination. It would obviously be invidious, and insufficiently compliant with Australia's human rights obligations, for such a provision to prohibit discrimination only against

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50 *Commonwealth Constitution*, ss41, 51(xxxi), 92, 80, 116, 117.

51 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 (Dixon J).

52 *Commonwealth Constitution*, ss7, 24; *Australian Capital Television Pty Ltd v Commonwealth [No 2]* (1992) 177 CLR 106.

53 *Lane v Australian Broadcasting Corporation* (1997) 189 CLR 520.

54 M. Davis & G. Williams, *Everything you need to know about the referendum to recognise Indigenous Australians*, NewSouth Publishing, Sydney, 2015, p. 112.

55 *Submission 18*, p. 15; *Submission 101*, p. 2.

Indigenous people – conformity to human rights principles requires that the Constitution protect all people from discrimination on grounds of race.<sup>56</sup>

5.62 Amnesty International said, in their submission, that proposed new section 116A would strengthen Australia's commitment to human rights:

The inclusion of a section which prohibits discrimination would further strengthen Australia's commitment to realising the principles of the UDHR, international human rights treaties and the Declaration on the Rights of Indigenous Peoples. The inclusion of new section 116A would not only represent a demonstrated commitment to Indigenous Peoples' rights in Australia, but would increase broader human rights protections for all Australian citizens in line with Australia's international human rights commitments.<sup>57</sup>

### **Concerns raised over the inclusion of an anti-discrimination provision**

5.63 In the Interim Report, the committee noted legal advice that the proposed new section 116A may increase the likelihood of litigation owing to its broad application.<sup>58</sup>

5.64 Since that report, the committee has received further advice in briefings, public hearings, and submissions. The concerns raised by witnesses and submitters are outlined below. These concerns include:

- the creation of legal uncertainty surrounding the interpretation of proposed new section 116A, and its impact on existing legislation;
- the exposure of legislation to judicial review and interpretation;
- whether existing Commonwealth and state legislation already performs this function; and
- inconsistencies between seeking to remove all reference to race while at the same time inserting references to race in proposed new sections 51A and 116A.

### ***Uncertainty and legal risks***

5.65 Mr Peter Quinlan SC questioned whether proposed new section 116A in the Constitution was the best way to achieve the goal of prohibiting discrimination or would 'complicate the objective of recognising Aboriginal and Torres Strait Islander peoples in an appropriate way within the Constitution'.<sup>59</sup>

5.66 The Public Law and Policy Research Unit at the University of Adelaide wrote, in their submission, that the potentially significant impact that a prohibition of

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56 *Submission 106*, p. 2.

57 *Submission 108*, p. 5.

58 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Interim Report*, July 2014, p. 18.

59 *Committee Hansard*, 10 September 2014, p. 8.

discrimination could have on Commonwealth, state and territory legislation may harm the progress of constitutional recognition:

In the time since the Expert Panel recommended s 116A, its wider scope and potentially wide interpretation by the courts to strike down legislation has caused public consternation. As such, we believe its inclusion is unnecessary, and may be detrimental to the success of this referendum on constitutional recognition of Aboriginal and Torres Strait Islander peoples.<sup>60</sup>

5.67 Similar concerns were raised by Mr Neil Young QC, who said in a private briefing to the committee that 'section 116A as a freestanding constitutional prohibition on discrimination has a lot of additional problems', such as definitions of discrimination and increased likelihood of litigation.<sup>61</sup>

5.68 Mr Young QC considered that the concerns outlined with respect to the proposed new section 116A would also apply to proposed new section 51A to prevent discrimination:

All of the issues that will arise under 116A, about the meaning and reach of a provision against discrimination, will also attend any proviso added to 51A along the lines that have been suggested.<sup>62</sup>

### ***Legislation potentially subject to judicial review***

5.69 Concerns about how the term 'discrimination' would be interpreted by the judiciary were raised by witnesses and submitters to the inquiry.

5.70 Mr Young QC highlighted the potential for litigation surrounding the interpretation of proposed new section 116A.

It creates a very complex intersection with 51A but it basically sets up a private right of action whenever one thinks a law—state, federal or territory—is discriminatory. That is the problem with 116A. The intersection would be, you first ask: is it a law within 51A, does it contravene the prohibition in section 116A(i) and is it released by subsection (ii)? It is really quite a complicated dynamic and is fertile for lots of litigation.<sup>63</sup>

5.71 However, Mr Quinlan SC acknowledged that 'there is a role for both the parliament and the courts in the way they interpret and approach the constitutional instrument'.<sup>64</sup>

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60 *Submission 42*, p. 4.

61 *Committee Hansard*, 19 May 2014, p. 13; *Committee Hansard*, 19 May 2014, p. 7; Mr Neil Young QC, 11 June 2014, p. 11

62 *Committee Hansard*, 19 May 2014, p. 7.

63 *Committee Hansard*, 19 May 2014, p. 13.

64 *Committee Hansard*, 10 September 2014, p. 10.

5.72 Professor George Williams AO told the committee that the risk of potential litigation need not be prohibitive, and noted the existence of the word 'discrimination' in the Constitution already:

...there are always real risks in putting language of this kind in. I suppose that is why these words have actually been chosen. It has always struck me as somewhat ironic that there is this concern about the language of discrimination but the reason that word is chosen is because it has the clearest legal meaning in this context. We already have the word 'discrimination' in the Constitution, section 117. The High Court has taken a cautious approach to that.<sup>65</sup>

5.73 While the committee acknowledges that such a provision could be subject to potential litigation, as are all provisions of the Constitution, the committee does not believe that the risk of litigation should be a reason not to proceed with the insertion of a prohibition of discrimination on the basis of race.

#### *Concerns over a Bill of Rights*

5.74 It has been suggested that the insertion of an anti-discrimination provision into the Constitution may be seen as a de facto Bill of Rights. A Bill of Rights is a list of rights of a citizen that are protected from infringement by another individual or by a government or public official. Bills of rights have been proposed in parliament but have failed, with attempts to introduce a bill of rights in 1944, 1973, 1982, 1984, 1985, 1988, 2000, 2001, 2005 and 2008 all failing to pass.<sup>66</sup>

5.75 The Cape York Institute summarised the competing views concerning an anti-discrimination provision. They noted that for some, the absence of a Bill of Rights in the Australian Constitution was a strength:

Conservatives believe that Parliament is best placed to determine the content and nature of citizens' rights. They are cautious to amend the Constitution in ways that may give the judiciary unwarranted interpretative power. Conservatives fundamentally believe that Parliament should decide matters of human rights, not unelected judges.

On the other hand, the Australian Constitution as it is has not worked well to protect the rights and interests of Indigenous Australians. History has demonstrated that Parliaments are not good at listening to Indigenous people. Unrestrained majoritarianism has not worked to protect Australia's most disadvantaged minority.

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65 *Committee Hansard*, 19 December 2014, p. 6.

66 Australian Parliament House, *Bill of rights*, [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/Browse\\_by\\_Topic/Key\\_Internet\\_Links/Copy\\_of\\_law/billofrights#attempts](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_Topic/Key_Internet_Links/Copy_of_law/billofrights#attempts) (accessed 26 March 2015).

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How can we find a synthesis or compromise between these two competing and largely polarised concerns?<sup>67</sup>

5.76 Professors Davis and Williams note that a number of rights are enshrined in the Constitution, and expressed the view that:

...a single clause prohibiting racial discrimination is not any form of Bill of Rights, not could the High Court turn it into one. It would only add another protection to the list of one-off rights already in the Constitution, such as those for freedom of religion in section 116 and trial by jury in section 80.<sup>68</sup>

5.77 They noted that, as proposed new section 116A does not mention any other rights, it is narrowly focussed on a protection from discrimination on the basis of race.<sup>69</sup>

5.78 Rather than acting as a 'one-clause bill of rights', the committee heard that an anti-discrimination provision would offer protection to Aboriginal and Torres Strait Islander peoples.<sup>70</sup> Associate Professor Sean Brennan puts it in the following way:

It is not a one-clause bill of rights. That is like saying the Racial Discrimination Act is a one-clause human rights act. It is a wild exaggeration. The panel's recommendation is a one-clause non-discrimination principle.<sup>71</sup>

### **Committee view**

5.79 The committee considers that the debate around the insertion of a prohibition of discrimination has been of vital importance throughout its work, and has heard evidence that its inclusion is considered necessary in order to provide substantive reform. Discussion has centred around whether this prohibition of discrimination should apply to Aboriginal and Torres Strait Islander peoples or more broadly to all Australian citizens.

5.80 The committee heard that there is overwhelming community support for a protection from discrimination on the basis of race. The committee considers that owing to the historical mistreatment of Aboriginal and Torres Strait Islander peoples, a protection from racial discrimination is warranted.

5.81 The committee has engaged in a thorough and discursive consultation with constitutional lawyers, submitters and witnesses on a proposed prohibition of discrimination and its narrow, or broad, application. The committee heard evidence that it is necessary to include a prohibition of discrimination against Aboriginal and

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67 *Submission 38*, pp 6-7.

68 M. Davis & G. Williams, *Everything you need to know about the referendum to recognise Indigenous Australians*, NewSouth Publishing, Sydney, 2015, p. 110.

69 M. Davis & G. Williams, *Everything you need to know about the referendum to recognise Indigenous Australians*, NewSouth Publishing, Sydney, 2015, p. 110.

Torres Strait Islander peoples in order to ensure that the historical mistreatment and discrimination of Australia's first peoples is not repeated.

5.82 The committee has also considered the application of such a provision to all Australians, and heard evidence that if a prohibition of discrimination were to be inserted into the Constitution, it would benefit all Australians. A prohibition of racial discrimination for all citizens would ensure that the mistreatment and discrimination of Australia's first peoples and those who have come to Australia since would not be repeated.

5.83 The committee reiterates its view that racial discrimination has no place in modern Australia, nor in the decisions of its parliament, and has carefully considered the options for ensuring that the parliament should not legislate in such a way that adversely discriminates on the basis of race.



## Chapter 6

### Parliamentary Scrutiny

6.1 As the committee has noted in this report, it has found that there is a very high level of support for a constitutional protection against racial discrimination. The committee acknowledges that Aboriginal and Torres Strait Islander peoples have concerns about the existing powers of the Commonwealth to enact racially discriminatory legislation and for it to be applied to them.

6.2 One option to mitigate against such a power that the committee has considered is an increased level of parliamentary scrutiny of legislation to assess potential detrimental impacts on Aboriginal and Torres Strait Islander peoples on the basis of race. In this section, the role of the Parliamentary Joint Committee on Human Rights is discussed, and the potential for it to include scrutiny of the United Nations Declaration on the Rights of Indigenous Peoples.

6.3 At a public hearing, the National Congress of Australia's First Peoples raised the Human Rights Committee as an appropriate model for an advisory group at a public hearing:

We are informed, from talking to members in that committee, that, as a result the bureaucrats are becoming much more informed about these instruments and obligations. At first it was sort of a shallow role that was played in that, but we think it is becoming more and more substantial as it goes. And not only that but we are pleased that it has survived changes of government—that the approach of having such a committee continues. We hope that it will go from strength to strength.<sup>1</sup>

6.4 Congress argued for a greater level of parliamentary scrutiny of legislation with regard to its impact on Aboriginal and Torres Strait Islander peoples:

...we are in desperate need of mechanisms by which we can hold parliamentarians to account for their decisions. We respect the role of the parliament—and...sometimes advice is in opposition to what government thinks or to current government policy, but if there were a robust exchange and mechanisms were built into the process, it would be a start.<sup>2</sup>

#### Parliamentary Joint Committee on Human Rights

6.5 The Parliamentary Joint Committee on Human Rights (Human Rights Committee) was established in 2011 to examine legislation for compatibility with human rights.

6.6 The committee was established under the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act).

6.7 The Human Rights Committee's role, as set out in section 7 of the Act, is:

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<sup>1</sup> *Committee Hansard*, 20 February 2015, p. 13.

<sup>2</sup> *Committee Hansard*, 20 February 2015, p. 17.

(a) to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the parliament on that issue;

(b) to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue;

(c) to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and report to both Houses of the Parliament on that matter.<sup>3</sup>

6.8 The committee regularly reports to parliament on legislation that has been introduced, currently reporting on the first Tuesday of every joint sitting week.<sup>4</sup>

6.9 The Act defines human rights as:

...the rights and freedoms recognised or declared by the following international instruments:

(a) the International Convention on the Elimination of all Forms of Racial Discrimination done at New York on 21 December 1965 ([1975] ATS 40);

(b) the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5);

(c) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23);

(d) the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9);

(e) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 10 December 1984 ([1989] ATS 21);

(f) the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4);

(g) the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006 ([2008] ATS 12).<sup>5</sup>

6.10 Professor George Williams AO and Ms Lisa Burton have described the Human Rights Committee as a novel way to ensure a high level of scrutiny of legislation:

...the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) takes this a major step further in providing the Australian Parliament with the exclusive role of ensuring human rights protection. This offers a unique opportunity

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<sup>3</sup> *Human Rights (Parliamentary Scrutiny) Act 2011*, s7.

<sup>4</sup> [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights) (accessed 23 February 2015)

<sup>5</sup> *Human Rights (Parliamentary Scrutiny) Act 2011*, s3(1).

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to assess the capacity of Parliament to protect human rights without court involvement.<sup>6</sup>

### ***United Nations Declaration on the Rights of Indigenous Peoples***

6.11 The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) it is a very significant instrument that elaborates on many human rights that already exist in international law, and their specific application to Indigenous peoples. It was endorsed by Australia in 2009.

6.12 Although UNDRIP is not currently listed as one of the instruments the Human Rights Committee scrutinises, the committee notes its relevance to the Human Rights Committee's work. This is because it may be understood as spelling out the details of many of the obligations under the human rights treaties listed in the committee's mandate.

6.13 UNDRIP articulates a range of clear principles, standards and guidance for the treatment of Indigenous peoples. This includes rights and freedoms such as self-determination and equality and non-discrimination.

6.14 The addition of the Declaration to the committee's mandate would thereby allow it to scrutinise bills, legislation and instruments for compatibility with all the principles in the Declaration.

6.15 Proposed Commonwealth legislation would require a statement of compatibility to be prepared, which would set out its potential effect against the United Nations Declaration on the Rights of Indigenous Peoples. The Human Rights committee uses the statement of compatibility which is currently prepared and the explanatory memorandum while conducting its scrutiny duties.

### **Committee view**

6.16 The committee considers that increased parliamentary scrutiny of legislation to assess potential detrimental impacts on Aboriginal and Torres Strait Islander peoples on the basis of race would be a substantial reform. The addition of scrutiny of UNDRIP to the Human Rights Committee's mandate would be a natural progression for that committee.

6.17 In Chapter 3 of this report, the committee considered a proposal to establish an Indigenous Advisory Council which would provide advice to the parliament on legislation. The committee considers that this body, if created, would only be able to provide advice on legislation before the parliament. The committee considers it preferable to place the onus on policymakers to consider the impact of legislation on Aboriginal and Torres Strait Islander peoples during the drafting process rather than after.

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6 George Williams & Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection', *Statute Law Review*, 34(1), 2013, 58-94, p. 58.

**Recommendation 6**

**6.18** The committee recommends that the *Human Rights (Parliamentary Scrutiny) Act 2011* be amended to include the United Nations Declaration on the Rights of Indigenous Peoples in the list of international instruments which comprise the definition of human rights under the Act.

## Chapter 7

### Future aspirations for sovereignty and treaty

7.1 During the course of its work, the committee heard the strong concerns of submitters and witnesses that recognition in the Constitution would put at risk potential claims of sovereignty and that recognition had the potential to extinguish aspirations for a treaty, or a series of treaties.<sup>1</sup>

7.2 The issues of sovereignty and the potential for a treaty or treaties to be made have received attention during the course of the committee's work, and prior to that, during the work of the Expert Panel.

7.3 In their report, the Expert Panel discussed the strong interest in sovereignty expressed by submitters to their inquiry:

At almost every consultation, Aboriginal and Torres Strait Islander participants raised issues of sovereignty, contending that sovereignty was never ceded, relinquished or validly extinguished. Participants at some consultations were concerned that recognition would have implications for sovereignty. There was also a concern that constitutional recognition and terms such as 'prior ownership' would compromise the few land rights that had been won to date.<sup>2</sup>

7.4 Professor Patrick Dodson, Co-Chair of the Expert Panel, expressed a view on the issues raised during the course of the Expert Panel's work during a hearing:

There are many issues people want to discuss. They are contentious issues such as sovereignty, treaty and compensation. There are many of those issues. There are ways to deal with them down the road.<sup>3</sup>

7.5 Professor Megan Davis, a member of the Expert Panel, has written that the term 'sovereignty' can carry different meanings to different people:

From the outset it is useful to note what 'sovereignty' may mean. This is important because it does have different meanings. Submissions to the Expert Panel and consultations in Aboriginal communities showed that sovereignty means different things to different communities.<sup>4</sup>

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1 *Committee Hansard*, 21 July 2014, *Committee Hansard*, 22 July 2014, *Committee Hansard*, 23 July 2014, *Committee Hansard*, 13 August 2014, *Committee Hansard*, 14 August 2014, *Committee Hansard*, 20 August 2014, *Committee Hansard*, 9 September 2014, *Committee Hansard*, 21 February 2015; *Submission 35*, p. 2, *Submission 83*, p. 2, *Submission 87*, p. 1, *Submission 90*, p. 2, *Submission 101*, p. 1.

2 *Recognising Aboriginal and Torres Strait Islander peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 97.

3 *Committee Hansard*, 21 July 2014, p. 23.

4 Professor Megan Davis, 'Constitutional Recognition does not foreclose on Aboriginal Sovereignty', *Indigenous Law Bulletin*, 8, 1, 2012, pp 12-14, p. 12.

7.6 Professor Davis further highlighted the view of the Expert Panel that constitutional recognition 'could not foreclose on the question of how Australia was settled' and that 'constitutional recognition—whether amendment of the race power or a non-discrimination clause—does not foreclose on the question of sovereignty'.<sup>5</sup>

7.7 The Expert Panel recognised that sovereignty was of great significance to Aboriginal and Torres Strait Islander peoples, but found that the question of sovereignty should be dealt with as a separate issue, outside of the process for constitutional recognition:

While questions relating to sovereignty are likely to continue to be the subject of debate in the community, including among Aboriginal and Torres Strait Islander Australians, the Panel does not consider that these questions can be resolved or advanced at this time by inclusion in a constitutional referendum proposal.<sup>6</sup>

### **Community interest in future sovereignty and treaty aspirations**

7.8 At public hearings, many witnesses discussed fears that recognition in the Constitution would preclude future sovereignty claims.<sup>7</sup>

7.9 At the public hearing in Broome, Dr Anne Poelina from Madjulla Inc spoke of the significance that discussions of sovereignty had for the Kimberley, and noted that 'there is also another dual conversation happening nationally around sovereignty' as well as around constitutional recognition.<sup>8</sup>

7.10 Mr Shane Duffy, Chief Executive Officer of Aboriginal and Torres Strait Islander Legal Services, informed the committee of the high level of community interest in sovereignty:

...the challenge for us across the country and for me particularly in my role as CEO in Queensland is that when we go and talk to our mob out in country about constitutional recognition their thoughts move to matters of sovereignty and treaty and why there is not something running parallel to at least keep a mature debate going.<sup>9</sup>

7.11 With regard to the dual conversations over constitutional recognition and sovereignty, Mr Peter Arndt, Executive Officer of the Brisbane Archdiocese Catholic Justice and Peace Commission, said that constitutional recognition and sovereignty were not mutually exclusive:

...we see this as a stepping stone. If all these recommended changes are put in a referendum and passed we see further discussion and debate about

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5 Professor Megan Davis, 'Constitutional Recognition does not foreclose on Aboriginal Sovereignty', *Indigenous Law Bulletin*, 8, 1, 2012, pp 12-14, p. 14.

6 *Recognising Aboriginal and Torres Strait Islander peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 213.

7 *Committee Hansard*, 30 June 2014, p. 16, p. 22; *Committee Hansard*, 21 February 2015.

8 *Committee Hansard*, 21 July 2014, p. 25.

9 *Committee Hansard*, 30 June 2014, p. 1.

future steps to promote the full realisation of the hopes and dreams of Aboriginal and Torres Strait Islander peoples, including discussion around sovereignty and treaty.<sup>10</sup>

7.12 Considering constitutional recognition as a part of a process that leads to treaty was also raised as a possibility by Mr Bobby Nicholls, Co-Convenor of the Shepparton Region Reconciliation Group:

The issues of constitutional recognition and a treaty and sovereignty are separate yet interrelated. The Shepparton Region Recognition Group would like to frame comments in the context of a treaty. We see the recognition of Aboriginal and Torres Strait Islander peoples and protection from racial discrimination in our Constitution as another crucial step in the journey to a treaty that recognises Aboriginal and Torres Strait Islander peoples.<sup>11</sup>

7.13 Ms Dierdre Robertson, Co-Convenor of the Shepparton Region Reconciliation Group, put to the committee that constitutional recognition would not signal the end of claims for sovereignty and treaties:

One of the things that we were talking about is how this could be an important step towards that but this is not the be-all and end-all: that treaty, sovereignty is still very much on the table. We might have to take this step as an interim, but there is a lot of discussion around: is this going to stop here with constitutional recognition? Is that all there is going to be? What we are saying is: that is where we see we should be headed.<sup>12</sup>

7.14 In their submission, Reconciliation Victoria explained the significance of treaty-making aspirations:

We see Constitutional Recognition as a positive step forward, but not an end to the reconciliation journey: it alone is not sufficient to achieve outcomes required of a fully reconciled and fair Australia.<sup>13</sup>

7.15 Further, they noted that the issue of sovereignty was of great interest and significance to the Aboriginal community:

...our experience in consultations with the Aboriginal community, that has also been reflected in the many submissions to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples [Joint Select Committee], have made clear the broad concerns that exist for consideration of matters of sovereignty, treaties and agreement making processes and that the [constitutional recognition] process not simply negate but enhance such prospects.<sup>14</sup>

7.16 The committee heard that the question of sovereignty may have actually superseded the issue of constitutional recognition in the minds of some Aboriginal and

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10 *Committee Hansard*, 30 June 2014, p. 25.

11 *Committee Hansard*, 13 August 2014, p. 6.

12 *Committee Hansard*, 13 August 2014, p. 9.

13 *Submission 35*, p. 2.

14 *Submission 35*, p. 2.

Torres Strait Islander people. At a public hearing, Mr Garth Dodd, from the Council of Aboriginal Elders, expressed the view that there is growing community interest in sovereignty:

That has probably come to the fore more so than constitutional recognition. It has gone away from the constitutional recognition to now saying: 'Let us all try to go down the sovereignty road. Maybe that will work for us.' I think people may be in two minds about constitutional recognition, as opposed to sovereignty.<sup>15</sup>

### **Advice regarding future sovereignty and treaty aspirations**

7.17 The committee has considered advice regarding the ability of Aboriginal and Torres Strait Islander peoples to pursue sovereignty and treaty aspirations in the future, if constitutional recognition occurs. The committee was provided with the legal advice given to the Expert Panel, which clearly stated that sovereignty claims would not be negated by constitutional recognition:

...recognition of Aboriginal and Torres Strait Islanders in the Constitution as equal citizens could not foreclose on the question of how Australia was settled, because the reasoning noted above proceeds on the basis of the common law constitutional consequences of perceived (and judicially received) history. That will not be altered by future amendments of the text of the written Constitution.<sup>16</sup>

7.18 This advice sought to clarify the history of British settlement with regard to sovereignty:

Given the previous presence of all the different indigenous inhabitants and owners of all the different countries now comprising the territory of the nation Australia, contemporary legal doctrine implies acceptance that the basis of settlement of Australia is and always has been, ultimately, the exertion of force by and on behalf of the British arrivals. They did not ask permission to settle. No-one consented, no-one ceded. Sovereignty was not passed from the aboriginal peoples to the settlers by any actions of legal significance voluntarily taken by or on behalf of the former or any of them.

...

The sovereignty of the Commonwealth of Australia and its constituent and subordinate polities the States and Territories, like that of the Imperial British Crown and its Australian Colonies their predecessors, thus does not depend in any way on any act of original or confirmatory acquiescence by or on behalf of Australia's indigenous peoples.<sup>17</sup>

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15 *Committee Hansard*, 13 March 2015, p. 21.

16 Bret Walker, *Constitutional recognition of Indigenous Australians: Opinion*, July 2011, p. 3.

17 Bret Walker, *Constitutional recognition of Indigenous Australians: Opinion*, July 2011, p. 2.



7.19 The Expert Panel report concluded that although sovereignty would not be precluded if constitutional recognition were granted, it was likely to be highly contested and should be separated from the proposal of constitutional recognition.<sup>18</sup>

### **Committee view**

7.20 The committee recognises that there is strong and continuing community interest in the question of sovereignty and future aspirations for a treaty or treaties, and notes that there is anxiety about whether constitutional recognition would have any impact on these future aspirations.

7.21 The committee affirms the finding of the Expert Panel that constitutional recognition would not preclude pursuit of the aspirations for recognition of sovereignty and treaty. The committee has received advice throughout its inquiry which supports the finding of the Expert Panel, and has sought to reassure Aboriginal and Torres Strait Islander peoples that recognition is unlikely to preclude future claims for sovereignty and treaty-making.

7.22 While the committee has heard from Aboriginal and Torres Strait Islander peoples that this is a topic of great significance, it acknowledges that the wider Australian community is not engaged with this potentially contentious issue.

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18 *Recognising Aboriginal and Torres Strait Islander peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 212.



## Chapter 8

### Mechanisms for engagement

8.1 The committee's establishing resolution sets out that the committee should consider mechanisms for engagement, including:

- (i) mechanisms to build further engagement and support for the constitutional recognition of Aboriginal and Torres Strait Islander peoples across all sectors of the community, and taking into account and complementing the existing work being undertaken by Recognise;<sup>1</sup>

8.2 The committee has considered constitutional conventions as a mechanism for engagement, and the role that conventions could play in building awareness of the proposed referendum. Conventions have the potential to engage a wide range of people and create a national conversation around constitutional recognition

8.3 The committee notes the significant work of Recognise, the people's movement focussed on raising awareness for constitutional recognition of Aboriginal and Torres Strait Islander peoples. Recognise receives government funding 'to help build awareness and support across the community for constitutional recognition'.<sup>2</sup>

#### Constitutional Conventions

8.4 Submitters to the inquiry have suggested that Peoples Conventions (conventions) be held to raise public support for the referendum, promote a feeling of popular ownership and bring the Australian public into the centre of the debate.<sup>3</sup>

8.5 This section will set out the historical context of conventions in Australia, and outline the proposals of submitters and witnesses. It will outline:

- the constitutional conventions held during the framing of the Australian Constitution and subsequent conventions;
- proposed organisation and participation; and
- proposed number and timing.

#### *Proposal for a Constitutional Convention*

8.6 Popular ownership has been identified as one of the five pillars vital to a successful referendum.<sup>4</sup> Professor George Williams AO and Mr David Hume have

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1 The Hon Mr Christopher Pyne, Leader of the House, Minister for Education, *House of Representatives Hansard*, 21 November 2013, p. 969.

2 Department of Prime Minister and Cabinet, *Constitutional recognition*, <http://www.dpmc.gov.au/indigenous-affairs/constitutional-recognition> (accessed 26 May 2015)

3 See *Submissions 74, 98, 81*. See also: G. Williams & D Hume, *People Power: The History and Future of the Referendum in Australia*, UNSW Press, 2010, pp 26-29.

4 G. Williams & D Hume, *People Power: The History and Future of the Referendum in Australia*, UNSW Press, 2010, pp 246-249.

identified conventions as a means to 'bring popular legitimacy to the reform process, and in so doing focus national media and popular attention on a specific agenda'.<sup>5</sup>

8.7 Further, they have highlighted the role conventions play promoting awareness and engagement, something they argue is vital for the success of a referendum:

By establishing an inclusive process that draws people in from across the nation, conventions can enable a broader range of voices to be heard than is normally the case when governments draft laws and develop new policies.<sup>6</sup>

8.8 Dr Paul Kildea, Lecturer and Director, Referendums Project, Gilbert + Tobin Centre of Public Law, University of New South Wales, has suggested that a Convention on constitutional recognition of Aboriginal and Torres Strait Islander peoples would 'bring together a diverse group of Australians to debate whether recognition is worth pursuing and, if so, how it might be achieved'.<sup>7</sup>

8.9 At a public hearing, Dr Kildea elaborated on the role that a convention could play:

They can boost the public profile of an issue, promote careful and informed discussion, promote public interest and serve as a source of valuable advice to governments.<sup>8</sup>

8.10 Dr Kildea further argued for the benefits of conventions:

While a convention would be a spectacle, it would also provide substance. It would create a space for careful and informed discussion about the merits, weaknesses and complexities of the various options for reform.<sup>9</sup>

8.11 The proposal for a convention was noted by Australians for Constitutional Monarchy (ACM) in their submission, which argued that:

...the only way that a referendum proposal for the constitutional recognition of indigenous people could be properly considered is by involving the people from the beginning, just as we did to federate.<sup>10</sup>

8.12 Further, ACM argued that a convention was crucial to progressing towards a successful referendum on constitutional recognition of Aboriginal and Torres Strait Islander peoples:

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5 G. Williams & D Hume, *People Power: The History and Future of the Referendum in Australia*, UNSW Press, 2010, p. 26.

6 G. Williams & D Hume, *People Power: The History and Future of the Referendum in Australia*, UNSW Press, 2010, p. 26.

7 Dr Paul Kildea, 'A people's convention can make Indigenous recognition a reality', *The Conversation*, 11 December 2014, <https://theconversation.com/a-peoples-convention-can-make-indigenous-recognition-a-reality-35139> (accessed 17 February 2015)

8 *Committee Hansard* 20 February 2015, p. 24.

9 *Submission 74*, p. 2.

10 *Submission 98*, p. 16.

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We believe that such a change of the Constitution should be considered from the beginning by the people through a representative constitutional convention. It should be the convention which prepares the referendum.<sup>11</sup>

8.13 Professor Marcia Langton, a member of the Expert Panel, has also expressed support for a convention, stating that 'conventions will be critical to the success of the proposed referendum'.<sup>12</sup>

### ***The history of Constitutional Conventions***

8.14 During the framing of the Australian Constitution, constitutional conventions (also known as the Federation Conventions) were held in Sydney, Adelaide and Melbourne in 1891 and 1897-1898. At these conventions, drafts of the Constitution were debated and amended by delegates from the colonial parliaments and the New Zealand Parliament.

8.15 The convention delegates did not include women or members of Aboriginal and Torres Strait Islander communities. Professor George Williams AO has drawn attention to the exclusion of Aboriginal peoples:

In most cases, Aboriginal people were not qualified to vote for the delegates to the Convention, and appear to have played no meaningful role in the drafting process itself.<sup>13</sup>

8.16 The records of debates during the conventions have been referred to by many submitters as a way to interpret the original intentions of the framers of the Constitution,<sup>14</sup> and indeed the High Court today draws upon the records of the Convention debates when interpreting the Constitution.<sup>15</sup>

8.17 Professor Langton outlined the significance of these records:

It is well understood in the Westminster tradition that historians and others should turn to the seminal texts, such as speeches, minutes and other materials, to interpret the meaning of a parliamentary decision or of legislation. This is how the records of the Australian constitutional conventions held in the 19<sup>th</sup> century conventions are used. They are a very important source of interpretive evidence for present-day questions about our Constitution.<sup>16</sup>

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11 *Submission 98*, p. 16.

12 *Submission 81*, p. 8.

13 George Williams, 'Race and the Australian Constitution: From Federation to Reconciliation', *Osgoode Hall Law Journal*, 38.4 (2000): 643-665, p. 648.

14 *Submission 84*, p. 2; *Submission 81*, p. 8.

15 M. Davis & G. Williams, *Everything you need to know about the referendum to recognise Indigenous Australians*, NewSouth Publishing, Sydney, 2015, p. 23.

16 *Submission 81*, p. 8.

### ***The First National Australasian Convention***

8.18 The first Constitutional Convention was held in Sydney in March, 1891, and was attended by delegates from each of the colonies and the New Zealand Parliament.<sup>17</sup> The result of the five-week convention was a draft of the Constitution which was circulated to the colonies.

8.19 The draft Constitution was to be put to a referendum in each of the colonies, but the process suffered a loss of momentum and public interest and lapsed.

8.20 Smaller conferences known as people's conferences were held in 1893 and 1896, and a Premier's conference was held in 1895. The first people's conference, held in Corowa, New South Wales in 1893, resulted in a proposal to directly elect delegates to a new convention and to subsequently hold a referendum to ratify the Australian Constitution.

8.21 The 1893 Corowa Convention has been noted by ACM for its role in allowing the Australian public to have a greater involvement in drafting the Constitution:

That has a great place in Australian history, because it was in 1893 at Corowa that a very successful convention was proposed. Had that not been proposed and acted on, we could well be six countries instead of one, because whenever a convention agreed on a constitution it was referred to the six colonial parliaments, they disagreed among themselves and no resolution ever emerged.<sup>18</sup>

### ***The Second National Australasian Convention***

8.22 The second convention met three times during 1897 and 1898 in Adelaide, Sydney and Melbourne, with the intervening time used for debate and public discussion.

8.23 The draft of the Constitution which was circulated after the 1891 convention was used as a framework in the second convention.

8.24 Provisions relating to the method of election of senators, the size of the houses, the ability to dissolve both houses in the event of deadlock and the return of revenue to the states were added to the Constitution at this convention.

8.25 The draft Constitution was then sent to the colonial parliaments for endorsement before being put to referendums. Referendums were held in New South Wales, Victoria, South Australia and Tasmania in June 1898 and passed in all but New South Wales, where the self-imposed minimum number of yes votes was not met.

8.26 The following year, the majority of the colonial premiers met to debate amendments to the draft Constitution before putting it to referendums again that year.

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17 Parliamentary Education Office, <http://www.peo.gov.au/learning/closer-look/federation-cl/federation-conventions.html> (accessed 17 February 2015)

18 *Committee Hansard*, 20 February 2015, p. 44.

Key changes included the possible location of the national capital. The referendum passed in Victoria, South Australia, New South Wales, Tasmania and Queensland.

### ***The Australian Constitutional Convention***

8.27 The Australian Constitutional Convention ran from 1973-1985 and was Australia's longest convention.

8.28 It was formed as a result of growing unrest in the states about Commonwealth powers, and was entirely made up of delegates from the federal and state parliaments.

8.29 Professor George Williams and Mr David Hume have argued that the convention became mired in partisan politics:

Although the convention came about in a spirit of consensus, it became increasingly divided as time passed, and proceedings degenerated into set-piece, party-line speeches.<sup>19</sup>

8.30 The selection of delegates exclusively from the federal and state parliaments was seen as dividing the convention along party lines, removing the convention from the public arena and therefore not engaging the Australian public. The committee considers that if a convention on the referendum were to be held on the proposal to recognise Aboriginal and Torres Strait Islander peoples, the mechanism for the selection of delegates should take into account the criticisms of the Australian Constitutional Convention.

### ***The 1998 Constitutional Convention***

8.31 When considering a referendum to ask whether Australia should become a republic, then Prime Minister John Howard held a ten day convention in Canberra in order to debate the model for a republic.

8.32 Half of those attending were elected and half were parliamentary and government delegates.

8.33 The convention recommended that, if a new preamble to the Constitution were to be considered, it should make explicit reference to Aboriginal and Torres Strait Islander peoples being the first peoples and custodians of the nation.<sup>20</sup>

8.34 This convention has been identified as a successful model for public engagement. Reasons for its success include:

- the prominence of the elections being held for half of the delegates;
- the broadcasting of proceedings on ABC Television; and
- fostering a high rate of public interest.<sup>21</sup>

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19 G. Williams & D. Hume, *People Power: The History and Future of the Referendum in Australia*, UNSW Press, 2010, p. 28.

20 M. Davis & G. Williams, *Everything you need to know about the referendum to recognise Indigenous Australians*, NewSouth Publishing, Sydney, 2015, pp 66-67.

21 G. Williams & D. Hume, *People Power: The History and Future of the Referendum in Australia*, UNSW Press, 2010, p. 27.

8.35 Although the referendum was not successful, the model for the convention has been seen as successful in terms of voter turnout for the election of delegates, high public interest, and for providing an example of a modern popular convention.<sup>22</sup>

### **The conventions' structure and participants**

8.36 This section will discuss some of the key issues identified with the holding of a convention. The committee considers that these issues are fundamental to the success or failure of a convention:

- location;
- number;
- involvement of Aboriginal and Torres Strait Islander peoples;
- how delegates are selected;
- timing; and
- costs and funding.

8.37 It has been suggested by Dr Kildea that the design of the convention is critical to its success or failure, and careful attention must be paid to the structure, content and selection of participants.

Choosing the best design for a people's convention on constitutional recognition will involve weighing up a range of contextual factors. Getting the design right is critical if the convention is to be effective, and accepted by the public and politicians as credible and legitimate.<sup>23</sup>

8.38 Dr Kildea proposed that delegates be randomly selected, and drew upon the design of the Australian Citizens' Parliament, held in 2009, as a potential model. For that event, delegates were drawn from each of the 150 electorates in the House of Representatives.<sup>24</sup>

8.39 At a public hearing, ACM noted the proposals of the Corowa Convention and future selection of delegates as a model for future conventions:

The Corowa principles, which we suggest be adopted here, are firstly that the convention be directly elected—hitherto the convention was nominated by the colonial authorities—and secondly, when the convention comes to its conclusion, there should be at least an understanding that, after consultation with the parliament, the convention's final view should then be put to the people.<sup>25</sup>

8.40 ACM further set out their proposal for the design of a convention:

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22 G. Williams & D Hume, *People Power: The History and Future of the Referendum in Australia*, UNSW Press, 2010, pp 26-27.

23 *Submission 74*, p. 22.

24 *Committee Hansard*, 20 February 2015, p. 27.

25 *Committee Hansard*, 20 February 2015, p. 44.



We think that the convention we have proposed should be comprised of 152 elected delegates. It should be a federal convention and bring in weighting for the states. We think there should be representation from all states with a weighted way of electing those representatives. We think that it is very important that it be an unpaid convention, that those who are there are there for their views, and that they are not there for other motives. But we do think there should also be 30 ex-officio members of that committee. We think that could be comprised possibly of eight Commonwealth representatives, 18 state representatives and four from the mainland territories.

We think there should also be 30 experts or community leaders. We think there should be provision for these 30 experts and community leaders for those who perhaps would otherwise not be elected, who may not be elected, or who could be underrepresented—for example, there could be an underrepresentation of young people and possibly Indigenous people. We think there should be provision made for that, as there was in 1998. We think there should be reasonable provision made for expenses that those who are involved in that process might incur, but they should certainly not be paid.<sup>26</sup>

8.41 Professor Langton proposed that an Indigenous convention be held:

Indigenous constitutional conventions should be conducted around the nation so that Indigenous Australians can grapple with the political and legal challenges at hand and form considered views on what constitutional and other reform proposals they support...<sup>27</sup>

### **Committee view**

8.42 The committee reiterates its view that for any referendum on constitutional recognition to be successful, it must have the support of Aboriginal and Torres Strait Islander peoples. The committee considers that an effective way to engage Aboriginal and Torres Strait Islander peoples would be to hold a convention made up of Aboriginal and Torres Strait Islander delegates, prior to holding a national convention. A certain number of delegates from that convention could be selected to attend the national convention, and present the first convention's findings.

### ***Timing and number***

8.43 The timing of the conventions was discussed in submissions, with Dr Kildea proposing that one convention be held one week prior to a day of concurrent debate in each House of Parliament.<sup>28</sup> Dr Kildea noted the recommendation of the committee, in its Progress Report:

...that each House of Parliament set aside a full day of sittings to debate concurrently recommendations of the Joint Select Committee on

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26 *Committee Hansard*, 20 February 2015, p. 45.

27 *Submission 81*, p. 7.

28 *Submission 74*, p. 18.

Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples...<sup>29</sup>

8.44 At a public hearing, the committee discussed with Dr Kildea the idea that multiple conventions be held that lead up to a 'primary' or 'national' convention. These conventions would be held across Australia, culminating in a large people's convention in Sydney.<sup>30</sup>

8.45 The committee considers that Sydney would be a fitting site for the final convention to be held because of the historical significance of Sydney as Australia's first settlement. The committee considers that holding the final convention in Sydney and settling the question to be put to referendum, would be of great symbolic value and allow the Constitution to come full circle.

8.46 Professor Williams and Mr Hume have argued that the holding of multiple events focussed on engaging the public would be needed. They suggest that debate and consultation should occur:

...in all the states; in both urban areas and the regions; and across a variety of age and ethnic groups. It should not be possible for Australians to feel that they have not had a chance to 'have their say';<sup>31</sup>

### Committee view

8.47 Holding multiple conventions could focus on state involvement, or make special provision to include groups such as young people and Aboriginal and Torres Strait Islander peoples, to avoid potential exclusion of these groups if random selection of delegates were to be used.

8.48 The committee considers that conventions would allow a greater diversity of people to be involved in the process of a referendum on Constitutional recognition.

### Recommendation 7

**8.49 The committee recommends that the government hold constitutional conventions as a mechanism for building support for a referendum and engaging a broad cross-section of the community while focussing the debate.**

### Recommendation 8

**8.50 The committee further recommends that conventions made up of Aboriginal and Torres Strait Islander delegates be held, with a certain number of those delegates then selected to participate in national conventions.**

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29 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Progress Report*, October 2014, p. ix.

30 *Committee Hansard*, 20 February 2015, p. 25.

31 G. Williams & D Hume, *People Power: The History and Future of the Referendum in Australia*, UNSW Press, 2010, p. 249.

## **Chapter 9**

### **Concluding remarks on achieving constitutional recognition**

9.1 The committee is of the strong view that recognition of Aboriginal and Torres Strait Islander peoples in the Constitution would be a way to complete the nation's important founding document. During its inquiry, the committee heard from witnesses and submitters that the Constitution is viewed as the 'birth certificate of the nation' and without the recognition of Aboriginal and Torres Strait Islander peoples, it is 'missing half the family'.<sup>1</sup>

9.2 The committee met with and heard from a large number of members of Aboriginal and Torres Strait Islander communities throughout its inquiry. The committee reiterates its view that for a referendum on constitutional recognition to succeed, it must have the support of Aboriginal and Torres Strait Islander peoples and be substantive.

9.3 This final report of the committee is the culmination of a discursive and thorough series of meetings, hearings and roundtables with a range of groups and stakeholders across Australia. During the committee's fifteen public hearings, the committee heard from a range of witnesses about their desire for constitutional recognition, their concerns and their general views on the treatment of Aboriginal and Torres Strait Islander peoples. At all times during its work, the committee has sought to hear the views of a wide range of groups and individuals in order to assess how best to progress towards a successful referendum.

9.4 The committee has met with a number of legal advisers and heard evidence from constitutional lawyers about the wording, structure and potential consequences of amendment, addition or repeal to the Constitution.

9.5 It is the committee's view that this report should be taken in the context of the whole inquiry, with the previously tabled reports as evidence of the committee's process.

9.6 This chapter will discuss issues that were raised with the committee during its inquiry, including the pressing and serious issues faced by Aboriginal and Torres Strait Islander peoples in everyday life.

9.7 This chapter will also reiterate its support for recommendations made in the previously tabled reports, and make recommendations for the future of the referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution.

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1 This sentiment has been expressed by witnesses and submitters a number of times throughout the inquiry, and has been attributed to Mr Harold Ludwick; Professor John Williams, *Committee Hansard*, 13 March 2015, p. 1.

### **Broader issues in Aboriginal and Torres Strait Islander communities**

9.8 The committee heard from witnesses and submitters that Aboriginal and Torres Strait Islander peoples face a number of pressing and serious issues in everyday life which make it difficult to focus on constitutional recognition.

9.9 Witnesses at the community forum in Emerton, Western Sydney, expressed the view that constitutional recognition was not viewed as a priority as there were more serious matters occupying the minds of Aboriginal and Torres Strait Islander peoples.<sup>2</sup>

9.10 Mr Garth Dodd, from the Council of Aboriginal Elders, spoke of the conflicting views over constitutional recognition in the Aboriginal community:

I have put to the council of this state, about the constitutional recognition, 'What do you think of or what would you like to say about it?' They have said: 'What's the use? This is just another bit of banter. Is it of any use to us?' On the other hand, there are some that are saying, 'Yes, we do need recognition from the very first document that rules this country, that we abide by, to at least have some sort of recognition on this document.' But then again a question was: 'What is it going to be? Is it going to be of any significance to us? What does it mean to us in the future? Will it change things for us in the future?'<sup>3</sup>

9.11 The committee heard from witnesses that while recognition in the Constitution would be a significant achievement, there was a grave need for more substantive and practical reform.<sup>4</sup>

### ***Experiences of racism***

9.12 The committee heard that racism has been experienced frequently by members of Aboriginal and Torres Strait Islander communities throughout their lives, and heard that young Aboriginal and Torres Strait Islander peoples continue to experience racial discrimination.

9.13 Mr Scott Rathman, from Reconciliation SA, told the committee about his experiences of racism:

People often mention to me that racism is getting better. No. They are wrong. I believe that in school it is much worse than when my parents went to school.<sup>5</sup>

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2 *Committee Hansard*, 21 February 2015.

3 *Committee Hansard*, 13 March 2015, p. 19.

4 *Committee Hansard*, 30 June 2014, p. 13; *Committee Hansard*, 21 July 2014, p. 4, p. 15, p. 19, p. 22; *Committee Hansard*, 22 July 2014, p. 2; *Committee Hansard*, 14 August 2014, p. 7, p. 20, *Committee Hansard*, 19 August 2014, p. 16; *Committee Hansard*, 10 September 2014, p. 21; 6 November 2014, p. 21; *Committee Hansard*, 20 February 2015, p. 18, p. 24, p. 30; *Committee Hansard*, 13 March 2015, p. 19.

5 *Committee Hansard*, 13 March 2015, p. 23.

9.14 The committee heard from the Lowitja Institute that a study conducted on the mental health impacts of racism revealed an alarming rate of racial discrimination in the everyday life of Aboriginal Australians.

9.15 The Lowitja Institute's study into the impact of racism on mental health saw participants surveyed about their experiences of racism.<sup>6</sup> The institute surveyed 755 Aboriginal Australians across four Victorian communities:

Aboriginal people were asked about their background, experiences of racism and where they occurred, response strategies and the impact of racism on anxiety, mental distress (measured using the K5 scale for psychological distress) and behaviour and the impact of racism on their family and community.<sup>7</sup>

9.16 Mr Romlie Mokak, Chief Executive Officer of the Lowitja Institute, informed the committee that '97 per cent of those surveyed had experienced racism in the 12 months prior'.<sup>8</sup>

9.17 The study revealed that 'most people had experienced racism multiple times, with more than 70 per cent experiencing eight or more incidents a year', and that the impact of these experiences on mental health were stark:

- Thirty per cent of respondents reported avoiding situations in daily life because of racism often or very often. This suggests that rates of racism would otherwise be much higher than reported here.
- This method of coping restricts opportunities for Aboriginal Australians to participate in activities that many other Australians take for granted.
- Many participants were also worried about the impact of racism on their families and friends.<sup>9</sup>

9.18 The report also noted that Aboriginal Australians may be 'putting up with racism' as part of everyday life, but that this was associated with a higher rate of stress.<sup>10</sup>

9.19 Recognise This, the youth-led constitutional recognition movement, argued that they see constitutional recognition:

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6 Lowitja Institute, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities*, January 2013.

7 Lowitja Institute, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities*, January 2013, p. 1.

8 Lowitja Institute, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities*, January 2013, p. 1.

9 Lowitja Institute, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities*, January 2013, p. 1.

10 Lowitja Institute, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities*, January 2013, p. 1.

...as the next step in a longer process of legal reform and social change rather than the final and ultimate goal. Constitutional recognition is an important step towards healing the wounds of the past and building stronger relationships between Aboriginal and Torres Strait Islander peoples, governments and other Australians, but it will not be a panacea for all of the complex challenges that Aboriginal and Torres Strait Islander peoples face.<sup>11</sup>

### **Committee view**

9.20 The committee is concerned at the evidence provided in respect of racial discrimination being experienced by Aboriginal and Torres Strait Islander peoples, and considers that these traumatic experiences, coupled with the historic mistreatment of Aboriginal and Torres Strait Islander peoples, has a significant impact on mental health.

9.21 The committee acknowledges that constitutional recognition of Aboriginal and Torres Strait Islander peoples would not be an end to racism or solve the serious and pressing issues faced by Aboriginal and Torres Strait Islander peoples in everyday life, but believes that recognition in the Constitution would be an important step in the journey towards reconciliation.

### **What would constitutional recognition mean?**

9.22 Recognise This, the youth movement for constitutional recognition, noted that young people make up more than 50 per cent of the Aboriginal and Torres Strait Islander population, making the contribution of young people to the debate on constitutional recognition a valuable and significant one.<sup>12</sup>

9.23 The committee has heard from a number of young people throughout its inquiry about their desire for constitutional recognition, and what recognition would mean to them.

9.24 The committee heard from Ms Jade Butler from Reconciliation SA that recognition in the Constitution could have the power to bring people together and have a unifying effect:

Within us there are no colours and there is no difference between blood. We all have a brain, a heart and a soul, so why is it that some see themselves as more powerful and more superior to others?

Recognising Aboriginal and Torres Strait Islanders as the first people of this nation shows how we all see ourselves as a special and proud nation.<sup>13</sup>

9.25 This sentiment was echoed by Mr Rathman, who expressed a hope that constitutional recognition would have a mitigating effect on racial discrimination:

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11 *Submission 123*, p. 9.

12 *Submission 123*, p. 2.

13 *Committee Hansard*, 13 March 2015, p. 23.

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We all need to speak up when racism and racially motivated bullying occurs in schools and the community. Racism will continue if constitutional recognition does not occur.

9.26 Mr Timothy Warwick, a teacher at Wanganui Park Secondary College, explained why he thought that constitutional recognition was important:

For this community I see constitutional recognition of Aboriginal and Torres Strait Islander peoples as vitally important. I believe that, if done correctly, it will send a strong message to our community of the importance of these first Australians. This is essential, as I have seen and have also been surprised that many students and other community members do not appreciate the significance of these groups.<sup>14</sup>

9.27 Ms Rihanna Bills-Kerr, a student from the Wanganui Park Secondary College, told the committee that 'recognition is not always enough, but knowing it is there and that it is part of the Constitution is a really big thing'.<sup>15</sup> She further argued for constitutional recognition:

I do believe that it would be a really important thing to happen and it would be good for the future of Australia just to have it be known not just to Australians that Aboriginal people are here and we have been here for countless years. It would be really important for the rest of the world to know that there are aboriginals in every country and they have different ways of living.<sup>16</sup>

9.28 Another student told the committee that constitutional recognition would highlight the history and culture of Aboriginal and Torres Strait Islander peoples and generate pride across Australia:

I thought if we can show that our culture is as amazing as it is and the stories are amazing and the celebrations we have are amazing, if we can show that to the rest of Australia, I think everyone is going to be on the one path.<sup>17</sup>

### **Committee view**

9.29 The committee heard from young Aboriginal and Torres Strait Islander peoples that constitutional recognition would have an important and lasting impact on their lives, by acknowledging the special role that Aboriginal and Torres Strait Islander peoples have in Australia.

9.30 The committee has been particularly conscious of the views of young Aboriginal and Torres Strait Islander peoples, not only because are a significant group, making up over 50 per cent of the Aboriginal and Torres Strait Islander

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14 *Committee Hansard*, 13 August 2014, p. 33.

15 *Committee Hansard*, 13 August 2014, p. 36.

16 *Committee Hansard*, 13 August 2014, p. 37.

17 *Committee Hansard*, 13 August 2014, p. 37.

population, but also because they represent the future of the world's oldest surviving culture.

9.31 The committee considers the recognition of Aboriginal and Torres Strait Islander peoples in the Constitution to be a significant step towards reconciliation, and would have tremendous symbolic value. The committee heard evidence that constitutional recognition would have a lasting positive effect by protecting Aboriginal and Torres Strait Islander peoples from discrimination on the basis of race, particularly by inserting wording to the effect of a prohibition of discrimination, as discussed in Chapter 4.

#### **Recommendation 9**

**9.32 The committee recommends that a referendum be held on the matter of recognising Aboriginal and Torres Strait Islander peoples in the Australian Constitution.**

#### **Recommendation 10**

**9.33 The committee recommends that a parliamentary process be established to oversight progress towards a successful referendum.**

**Mr Ken Wyatt AM MP**  
**Chair**



# Appendix 1

## Recommendations of the Expert Panel

1.1 Below are the recommendations made by the Expert Panel in their 2012 report.

### Recommendations for changes to the Constitution

The Panel recommends:

1. That section 25 be repealed.
2. That section 51(xxvi) be repealed.
3. That a new 'section 51A' be inserted, along the following lines:

#### **Section 51A Recognition of Aboriginal and Torres Strait Islander peoples**

**Recognising** that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

**Acknowledging** the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

**Respecting** the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

**Acknowledging** the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;

the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.

The Panel further recommends that the repeal of section 51(xxvi) and the insertion of the new 'section 51A' be proposed together.

4. That a new 'section 116A' be inserted, along the following lines:

#### **Section 116A Prohibition of racial discrimination**

- (1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.
- (2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.

5. That a new 'section 127A' be inserted, along the following lines:

**Section 127A Recognition of languages**

- (1) The national language of the Commonwealth of Australia is English.
- (2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.

## Appendix 2

### Options put forward in the Interim Report

#### Box 1<sup>1</sup>

*A proposed new section providing the Commonwealth with power to legislate with respect to Aboriginal and Torres Strait Islander peoples*

It has been put to the committee:

- 1 That section 51(xxvi) be repealed.
- 2 That a new 'section 51A' be inserted, along the following lines:

#### **51A Recognition of Aboriginal and Torres Strait Islander peoples**

**Recognising** that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

**Acknowledging** the continuing relationship of Aboriginal and Torres Strait Islander people with their traditional lands and waters;

**Recognising** the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

~~**Acknowledging** the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;~~

**Acknowledging** that the Aboriginal and Torres Strait Islander languages are the original Australian languages and a part of our national heritage;

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples, but not so as to discriminate adversely against them.

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1 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Interim Report*, October 2014, p. 11.

**Box 2<sup>2</sup>**

*A proposed new chapter providing the Commonwealth with power to legislate with respect to Aboriginal and Torres Strait Islander peoples*

It has been put to the committee:

- 1 That section 51(xxvi) be repealed.
- 2 That a new 'Chapter IIIA' be inserted, along the following lines:

**80A Recognition of Aboriginal and Torres Strait Islander Peoples**

**Recognising** that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

**Acknowledging** the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

**Respecting** the continuing cultures and heritage of Aboriginal and Torres Strait Islander peoples;

**Acknowledging** that Aboriginal and Torres Strait Islander languages are the original Australian languages and a part of our national heritage;

- (1) The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.
- (2) Laws specially applicable to Aboriginal and Torres Strait Islander peoples, whether enacted under this section or under any other provision of the Constitution, shall not discriminate adversely against them.

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2 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Interim Report*, October 2014, p. 12.

**Box 3<sup>3</sup>**

*Proposed new section providing the Commonwealth with power to legislate with respect to certain subject matters*

It has been put to the committee:

- 1 That section 51(xxvi) be repealed.
- 2 That a new 'section 51A' be inserted, along the following lines:

**51A Recognition of Aboriginal and Torres Strait Islander peoples**

**Recognising** that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

**Acknowledging** the continuing relationship of Aboriginal and Torres Strait Islander people with their traditional lands and waters;

**Recognising** the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

~~**Acknowledging** the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;~~

**Acknowledging** that the Aboriginal and Torres Strait Islander languages are the original Australian languages and a part of our national heritage;

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to the cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples and the relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters.<sup>1</sup>

**Box 4<sup>4</sup>**

*Proposed new wording for section 51(xxvi) of the Constitution*

It has been put to the committee:

- 1 That section 51(xxvi) be repealed.
- 2 That a new 'section 51(xxvi)' be inserted:

**51 Legislative powers of the Parliament**

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(xxvi) Aboriginal and Torres Strait Islander peoples, but not so as to discriminate adversely against them.

3 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Interim Report*, October 2014, p. 14.

4 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Interim Report*, October 2014, p. 15.

**Box 5<sup>5</sup>**

*Proposed new wording for section 51(xxvi) of the Constitution requiring the Commonwealth to also enact an Act of Recognition*

It has been put to the committee:

- 1 That section 51(xxvi) be repealed.
- 2 That a new 'section 51(xxvi)' be inserted:

**51 Legislative powers of the Parliament**

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

- (xxvi) Aboriginal and Torres Strait Islander peoples, but not so as to discriminate adversely against them and within this power must enact an Act of Recognition.

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5 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Interim Report*, October 2014, p. 27.

## **Appendix 3**

### **Recommendations of the Progress Report**

#### **Recommendation 1 – Concurrent debate**

1.1 The committee recommends that each House of Parliament set aside a full day of sittings to debate concurrently recommendations of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples as set out in this report with a view to achieving near-unanimous parliamentary support for and building momentum towards a referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution.

#### **Recommendation 2 – Repeal of s25**

1.10 The committee recommends repealing section 25 of the Constitution.

#### **Recommendation 3 – Proposed new section 127A**

1.13 The committee recommends not inserting the Expert Panel's proposed new section 127A.

#### **Recommendation 4 – Repeal or amendment of s51(xxvi)**

1.17 The committee recommends the repeal or amendment of section 51(xxvi) to remove the reference to race.

#### **Recommendation 5 – Proposed new section 51A**

1.19 The committee recommends that the Parliament consider three structural options for constitutional recognition of Aboriginal and Torres Strait Islander peoples that follow, noting the committee's view that any proposal must preserve both existing Commonwealth laws relying on section 51(xxvi) and the Commonwealth's power to make laws with respect to Aboriginal and Torres Strait Islander peoples.

##### ***OPTION 1 – New section 51A with a broad prohibition of racial discrimination incorporating the Expert Panel's section 116A amendment***

##### **51A Recognition of Aboriginal and Torres Strait Islander Peoples**

**Recognising** that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

**Acknowledging** the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

**Respecting** the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.

##### **116A Prohibition of racial discrimination**

The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.

Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group;

***OPTION 2 – New section 51A with a limited prohibition of discrimination by the Commonwealth against Aboriginal and Torres Strait Islander peoples***

**51A Recognition of Aboriginal and Torres Strait Islander peoples**

**Recognising** that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

**Acknowledging** the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

**Respecting** the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

- (1) The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples, but not so as to discriminate adversely against them.
- (2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of Aboriginal and Torres Strait Islander peoples.

***OPTION 3 – Redraft section 51(xxvi) to allow the Commonwealth Parliament to make laws with respect to Aboriginal and Torres Strait Islander peoples with the option of enacting an Act of Recognition***

**51 Legislative Powers of the Parliament**

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

- (xxvi) Aboriginal and Torres Strait Islander peoples.

**Recommendation 6 – Referendum**

1.41 The committee recommends that a referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution take place at or shortly after the next federal election in 2016.

**Recommendation 7 – *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013***

1.43 The committee recommends that the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* should be extended to align with the proposed timing of a referendum.



## **Appendix 4**

### **Submissions received**

<b>Submission Number</b>	<b>Submitter</b>
1	Reconciliation Victoria
2	Mr Nick Hobson
3	Mr Moyle AM, Mr Moore and Mr Botsman
4	Mr Darren Siems
5	Mrs V.D. Burnett
6	Constitution Education Fund Australia (CEFA)
7	ANTaR
8	Mrs Diana Ekman
9	Mr James Lewis
10	Oxfam Australia
11	Geelong Constitutional Recognition Project
12	Mr Peter Forde
13	Victorian Constitutional Recognition Coalition
14	Mr Luke Beck
15	Concerned Australians
16	Mr Robert Ludlow
17	Mr Paul Nolan
	17.1 Supplementary Submission
	17.2 Supplementary Submission
18	Dr A. Wood
	18.1 Supplementary Submission
19	Catholics in Coalition for Justice and Peace
20	Roper Gulf Regional Council
21	Mr Marc Ferre
22	Miss Cassie Houghton

23	Cr Murray Cook
24	Mr Colin Jones
25	Goldfields Land and Sea Council
26	Baptist Care
27	Mr David Williams
28	Sisters of Mercy Parramatta
29	Mr Damien Freeman and Mr Julian Leeser
	29.1 Supplementary Submission
30	Mr Doug Trace
31	Mr Keith Irwin
32	Dr Lester-Irabinna Rigney
33	West Daly Regional Council
34	City of Melbourne
35	Reconciliation Victoria
	35.1 Supplementary Submission
36	St Vincent de Paul Society
37	New South Wales Aboriginal Land Council
38	Cape York Institute
	38.1 Supplementary Submission
	38.2 Supplementary Submission
39	The Law Society of Western Australia
40	Ms Adrienne Elmitt
41	Lord Mayor Clover Moore
42	Public Law and Policy Research Unit - University of Adelaide
43	Humanist Society of Victoria
44	ACT Aboriginal and Torres Strait Islander Elected Body
45	The Law Society of NSW
46	La Trobe University
47	Anglican Diocese of Willochra
48	Edith Cowan University
49	Australian Red Cross

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50	Ms Josephine Nemorin
51	AnglicareSA
52	The Royal Australian College of General Practitioners
53	The Royal Australian and New Zealand College of Psychiatrists
54	Mr Neville Clark
55	Australian Human Rights Commission
56	The Law Society of South Australia
57	Ms Alex Reid
58	Name Withheld
59	Miss Amelia Abbott
60	Local Government Association of South Australia
61	Reconciliation WA
62	Australian Indigenous Leadership Centre
63	The Law Society of NSW
64	Central Desert Native Title Services
65	IAG
66	Cairns Regional Council
67	Tasmanians for Recognition
68	Queensland Law Society
	68.1 Supplementary Submission
69	Mr Patrick Govey
70	Mr Harold Ludwick
	70.1 Supplementary Submission
71	Mr John Pyke
72	Mr John Simon
73	Mr John Grogan
74	Mr Paul Kildea
75	Mr G. H. Schorel-Hlavka
76	Glen Eira City Council
77	Reconciliation Australia
78	Aboriginal Embassy Victoria

79	Name Withheld
80	ANTAR SA
81	Professor Marcia Langton
82	Name Withheld
83	NSW Reconciliation Council
84	Family Voice Australia
85	Ms Jennifer Symonds
86	Ms Susan Chalcroft
87	Mr Klaus Kaulfuss
88	Ms Sandra Kelly
89	Western Region Local Government Reconciliation Network
90	Ms Cheryl Kaulfuss
91	Uniting Justice Australia
92	Wayside Chapel
93	Business Council of Australia
94	Cape York Land Council
95	Liberty Victoria
96	Mr Sebastian Tops
97	Allens Linklaters
98	Australians for Constitutional Monarchy
99	Global Shapers Sydney
100	Ms Marg Smyrnis
101	Scarred Tree Indigenous Ministries
102	Hunter Churches
103	Empowered Communities
104	Australian Monarchist League
105	Wyndham City
106	Dr Bede Harris
	106.1 Supplementary Submission
107	Ms Helen Dodds
108	Amnesty International

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109	Professor Geoffrey Lindell
110	Yamatji Marlpa Aboriginal Corporation
111	Australian Christian Lobby
112	Yothu Yindi Foundation
113	Uniting Care Queensland
114	Mr Phillip Sweeney
115	Torres Strait Regional Authority
116	Aboriginal Peak Organisation of the Northern Territory
117	Mr Wally and Margaret Johnson
118	Mr Keith Chester
119	Public Affairs Commission of the Anglican Church of Australia
120	Dr Lucinda Aberdeen
121	Name Withheld
122	Dr John Chesterman
123	Recognise This
124	Mr Patrick O'Shane
125	The Honourable Tom Stephens OAM JP
126	Kimberley Land Council
127	Mr Graham Bradley
128	Mr Robert Ellicott
129	La Perouse Local Aboriginal Land Council
130	Reconciliation SA
131	Professor Anne Twomey
132	Dr Gabrielle Appleby
133	Professor George Williams AO
134	Mr Ray Groom
135	Dr Fergal Davis
136	Professor Cheryl Saunders
137	Mr Damien Freeman
138	Castan Centre for Human Rights Law
139	Mr Rodney Morrison

## **Tabled documents and additional information**

- 1     Tabled Document: Speech on Madayin Law, received from Dr Rev. Gondarra OAM, Chairman, Arnhem Land Progress Aboriginal Corporation on 20 August 2014.
- 2     Tabled Document: Speech, newspaper articles and photographs received from Mr Eric Fejo, Private Capacity on 20 August 2014.
- 3     Additional Information: Legal Question for Advice from the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples.
- 4     Additional Information: Opinion on the effect of proposed amendments to the Commonwealth Constitution on certain Commonwealth laws, Mr Stephen Lloyd SC and Mr David Hume, 24 June 2014.
- 5     Additional Information: Opinion on recommendations made by the Expert Panel on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Mr Neil Young QC, 11 June 2014.
- 6     Additional Information: Advice to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Act of Recognition, Professor George Williams, 29 September 2014.
- 7     Additional Information: Advice on an Act of Recognition to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Act of Recognition, Dr Anne Twomey, 30 September 2014.
- 8     Answer to Questions on Notice: Asked at a public hearing on 13 November, received from the Hobart Community Legal Centre on 28 November 2014.
- 9     Roundtable Discussion: Meeting with Torres Strait Regional Authority on Thursday Island on 5 November 2014.
- 10    Roundtable Discussion: Meeting with Cape York Institute and Professors Twomey and Williams on 19 December 2014.

## **Appendix 5**

### **Public hearings and witnesses**

#### **BRISBANE, 30 June 2014**

DUFFY, Mr Shane, Chief Executive Officer, Aboriginal and Torres Strait Islander Legal Services

BROWN, Mr Ian, President, Queensland Law Society

D'CRUZ, Ms Raylene, Policy Solicitor, Queensland Law Society

DUNN, Mr Matthew, Principal Policy Solicitor, Queensland Law Society

GSCHWIND, Mr Daniel, Chief Executive Officer, Queensland Tourism Industry Council

WHARTON, Mr Wayne Morris, Kooma man and Representative, Brisbane Aboriginal Sovereign Embassy

BENNET, Mrs Pele, Queensland Aboriginal and Islander Health Council

BUTTON, Mr Selwyn, CEO, Queensland Aboriginal and Islander Health Council

ARNDT, Mr Peter, Executive Officer, Brisbane Archdiocese Catholic Justice and Peace Commission

MILLER, Mr David, Member, Brisbane Archdiocese Catholic Justice and Peace Commission

WALDREN, Ms Ravina, Coordinator, Catholic Archdiocese of Brisbane Murri Ministry Team

#### **BROOME, 21 JULY 2014**

BIRCH, Mr Tom, Deputy Chairman, Kimberley Land Council

DIA, Ms Melody, Remote Care Coordinator, Kimberley Aged and Community Services

DODSON, Professor Patrick Lionel, Private capacity

GORRING, Mr Bruce, Acting Director, Nulungu Research Institute, University of Notre Dame Australia

HUNTER, Mr Nolan, Chief Executive Officer, Kimberley Land Council

McKENNA, Ms Raeylene, Team Leader, Kimberley Aboriginal Medical Services Council Inc.

POELINA, Dr Anne, Managing Director, Madjulla Inc.

ROBERTS, Ms Faith, ACAT Coordinator, Kimberley Aged and Community services

### **HALLS CREEK, 22 JULY 2014**

EDWARDS, Councillor Malcolm, President, Shire of Halls Creek

TAIT, Mr Greg, Lungga Gidja man

TRUST, Mr Ian Richard, Chairman and Executive Director, Wunan Foundation

GREEN, Mr Ribnga Kenneth, Private capacity

GREEN, Ms Shantelle, Private capacity

GARSTONE, Ms Brenda, Private capacity

YOUNG, Mr Benjamin, Private capacity

### **FITZROY CROSSING, 23 JULY 2014**

BROWN, Mr Joe, Adviser, Kimberley Aboriginal Law and Cultural Centre

CARTER, Mr Neil Angus, Kimberley Aboriginal Repatriation Officer, Kimberley Aboriginal Law and Cultural Centre

HERRING, Mr Scott, Project Officer, Kimberley Aboriginal Law and Cultural Centre

STREET, Mr Mervyn, Chair, Kimberley Aboriginal Law and Cultural Centre

WISE, Mr Butcher, Kimberley Aboriginal Law and Cultural Centre

OSCAR, Ms June, AO, Chief Executive Officer, Marninwarntikura Women's Resource Centre

KOGOLO, Ms Annette, Vice Chair, Mangkaja Arts Resource Agency

BEDFORD, Mr Dickie, Executive Director, Marra Worra Worra Aboriginal Corporation

JOHNSTON, Mr Sam, Private capacity

McCORD, Mr Edward Mort, Private capacity

MONTAG, Miss Jemima Esther, Private capacity

NERI, Mr Gabriel Luc, Private capacity

OMOND, Miss Charlotte Emily, Private capacity

SHADFORTH, Miss Tashina Marie, Private capacity

TENEILLE, Ms Francis, Private capacity



**SHEPPARTON, 13 AUGUST 2014**

POLAN, Councillor Michael, Councillor, Greater Shepparton City Council

THOMSON, Ms Kaye, Director, Community, Greater Shepparton City Council

NICHOLLS, Mr Bobby, Co-Convenor, Shepparton Region Reconciliation Group

ROBERTSON, Ms Dierdre, Co-Convenor, Shepparton Region Reconciliation Group

PARNELL, Reverend Chris, Secretary, Shepparton Interfaith Network

PURCELL, Dr Frank, President, Shepparton Interfaith Network

ATKINSON, Mr John Edward (Sandy), OAM, Bangerang Cultural Centre

HAZELMAN, Mr Chris, Manager, Ethnic Council of Shepparton and District

BILLS-KERR, Rhianna, Private capacity

COOPER, Billy, Private capacity

COOTE, Chris, Private capacity

MORRIS, Mr Neil, Private capacity

WARWICK, Mr Timothy, Private capacity

WEST, Dalton, Private capacity

HANEY, Mr Nicholas, Regional Manager, Catholic Care Sandhurst

**MELBOURNE, 14 AUGUST 2014**

GUTHRIE, Ms Mary, General Manager of Policy, The Lowitja Institute

MOKAK, Mr Romlie, Chief Executive Officer, The Lowitja Institute

BAXTER, Mr John, Council Member, Reconciliation Victoria

CHAPMAN, Ms Deb, Acting Statewide Coordinator, Reconciliation Victoria

CHAUVEL, Ms Emily, Project Facilitator, Reconciliation Victoria

CLARK, Ms Vicki, Co-Chair, Reconciliation Victoria

GROSSER, Ms Vicky, Project Coordinator, Geelong Constitutional Recognition Project

MULROY, Ms Sheenagh, Planning Group Member, Geelong Constitutional Recognition Project

LEWIS, Dr Peter, Aboriginal and Torres Strait Islander Peoples Rights Advocacy Lead, Oxfam Australia

SMITH, Reverend Ian, Executive Officer, Victorian Council of Churches, Victorian Recognition Reconciliation Coalition

CHAUVEL, Ms Emily, Project Facilitator, Reconciliation Victoria, Victorian Recognition Reconciliation Coalition

DONNELLY, Ms Jude, Head of Government Relations, Australian Football League

MIFSUD, Mr Jason, Head of Diversity, Australian Football League

CARTER, Mr Daniel, Indigenous Student Representative, Monash Student Association; Member, Monash Reconciliation Group

GALLAGHER, Ms Jill, AO, Private capacity

LEIBLER, Mr Mark, AC, Senior Partner, Arnold Bloch Leibler

### **KATHERINE, 19 AUGUST 2014**

MILLER, Councillor Christina Fay, Mayor, Katherine Town Council

HILLEN, Mrs Sharon, Director of Council Services and Infrastructure, Roper Gulf Regional Council

ROPER, Mr Stephen, employee, Roper Gulf Regional Council

RAVONCIRI, Ms Jossy, Manyallaluk Community

RAVONCIRI, Mr Mikaele, Manyallaluk Community

WILLIRI, Ms Cynthia, Manyallaluk Community

WILLIRI, Ms Tanya, Manyallaluk Community

CASTINE, Mr Graham, Chair, Katherine Regional Aboriginal Health and Related Services; Chief Executive Officer, Sunrise Health Service

FAWKNER, Mr Matt, Member, Sunrise Health

LEE, Ms Anne Marie, Chief Executive Officer, Katherine Regional Aboriginal Health and Related Services

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**DARWIN, 20 AUGUST 2014**

COLLINS, Ms Priscilla, Chief Executive Officer, Aboriginal Peak Organisations Northern Territory

COOPER, Dr David, Manager Research Advocacy Policy, Aboriginal Medical Services Alliance Northern Territory

PATERSON, Mr John, Chief Executive Officer, Aboriginal Medical Services Alliance Northern Territory

SHARP, Mr Jared, Manager Law and Justice Projects, NAAJA, Aboriginal Peak Organisations Northern Territory

SINGH, Ms Maria, Liaison Officer, Northern Land Council

McLINDEN, Mr Peter, Manager, Transport and Infrastructure, Local Government Association of the Northern Territory

TAPSELL, Mr Tony, Chief Executive Officer, Local Government Association of the Northern Territory

HURLEY, Bishop Eugene, Catholic Diocese of Darwin

HAVNEN, Ms Olga, Chief Executive Officer, Danila Dilba Health Service

McLAUGHLIN, Ms Joy, Senior Project Officer, Danila Dilba Health Service

LAWRIE, Ms Delia Phoebe, Leader of the Opposition, Northern Territory Parliament

VOWLES, Mr Ken, Shadow Minister for Indigenous Policy, Northern Territory Parliament

D'ANTOINE, Ms Heather, Associate Director, Aboriginal Programs, Menzies School of Health Research

FEJO, Mr Eric, Private capacity

GONDARRA, Rev. Dr Djiniyini, OAM, Chairman, Arnhem Land Progress Aboriginal Corporation

COLLINS, Ms Priscilla, Chief Executive Officer, Aboriginal Peak Organisations Northern Territory

COOPER, Dr David, Manager Research Advocacy Policy, Aboriginal Medical Services Alliance Northern Territory

PATERSON, Mr John, Chief Executive Officer, Aboriginal Medical Services Alliance Northern Territory

SHARP, Mr Jared, Manager Law and Justice Projects, NAAJA, Aboriginal Peak Organisations Northern Territory

SINGH, Ms Maria, Liaison Officer, Northern Land Council

**KALGOORLIE, 9 SEPTEMBER 2014**

McLERIE, Mrs Linda Marie, President, Rotary Club of Hannans-Kalgoorlie

COULSTON, Mr David John, Private capacity

GALLAGHER, Mr Hugh, Chief Executive Officer, Kalgoorlie-Boulder Chamber of Commerce and Industry

JACOBSEN, Ms Lee, President, Kalgoorlie-Boulder Chamber of Commerce and Industry

BOKELUND, Mr Hans Paul, Chief Executive Officer, Goldfields Land and Sea Council

DONALDSON, Mr Trevor, Traditional Custodian

CROOK, Mr Anthony (Tony) John, Board Chairman, Goldfields-Esperance Development Commission

ROBINS, Mr Steven, Acting Chief Executive Officer, Goldfields-Esperance Development Commission

BROWNLEY, Mrs Marcia, Private capacity

BROWNLEY, Mr Linden, Private capacity

BROWNLEY, Mr Trevor John, Private capacity

BROWNLEY, Mr Tyrone, Private capacity

MARTIN, Mr Francis, Private capacity

**PERTH, 10 SEPTEMBER 2014**

KEOGH, Mr Matthew, Senior Vice President, Law Society of Western Australia

SOLONEC, Ms Tammy, Member, Aboriginal Lawyers Committee, Law Society of Western Australia

QUINLAN SC, Mr Peter Damien, President, Western Australian Bar Association

HENRY, Mr Reginald James, Culture and Workforce Development Senior, Ruah Community Services

LYNCH, Mr Francis, Chief Executive, Ruah Community Services

BENJAMIN, Miss Kimberley, Program Officer, Reconciliation WA

CARTER, Mr Alan John, Co-chair, Reconciliation WA

MORRISON, Mr James, Reconciliation WA

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SEBIRE, Miss Verity Jane, Board member, Reconciliation WA

HOUGHTON, Miss Cassandra, Private capacity

WHEARE, Ms Janette, Private capacity

#### **CAIRNS, 6 November 2014**

ADDO, Ms Sarah, Private capacity

BOISEN, Ms Sue, General Manager, Indigenous Services, Blue Care

DALE, Prof. Allan, Professor in Tropical Regional Development, James Cook University

ENTSCH, Mr Warren, member for Leichhardt

FOLEY, Most Reverend James, Catholic Bishop of Cairns

GELA, Councillor Fred, Mayor, Torres Strait Island Regional Council

HANCOCK, Ms Deborah, Chief Executive Officer, Cairns Chamber of Commerce

JANS, Mr Jack, Cape York Sustainable Futures

JOSE, Ms Fiona, Chief Executive Officer, Cape York Institute

KERR, Mr Andrew, Partner, Preston Law

KIRCHNER, Ms Linda, Acting General Manager, Community, Sport and Cultural Services

LITTLE, Mrs Jeannie, Private capacity

MANNING, Councillor Bob, Mayor, Cairns Regional Council

MORRIS, Ms Shireen, Policy Adviser, Constitutional Reform Research Fellow, Cape York Institute

ROBERTS, Mr Ian, Chief Executive Officer, Anglicare North Queensland

#### **HOBART, 13 November 2014**

DILLON, Mr Rodney Scott, Private capacity

BAILEY, Mr Michael, Chief Executive Officer, Tasmanian Chamber of Commerce and Industry.

FINLAY, Reverend Grant, Regional Minister, Uniting Aboriginal and Islander Christian Congress

KEYS, Ms Kara, Indigenous Officer, Australia Council of Trade Unions

LAWSON, Mr Bill, AM, Co-chair, Tasmanians for Recognition

HODUL LENTON, Ms Marta, Executive Officer, Tasmanians for Recognition

THORP, Ms Laurette, Manager, Office of Aboriginal Affairs, Tasmanian Department of Premier and Cabinet

WALTER, Prof. Maggie, Pro Vice-Chancellor, Aboriginal Research and Leadership, University of Tasmania

HUTCHISON, Ms Jane, Director, Hobart Community Legal Service

WHITE, Mr John, Solicitor, Hobart Community Legal Service

ANDERSEN, Ms Clair

BUTLER, Ms Ronna

HAND, Ms Jo

#### **SYDNEY, 13 November 2014**

CHATFIELD, Ms Constance, Aboriginal Liaison Officer, Local Government NSW

DADD, Dr Lawrence, Immediate Past Chair, Aboriginal and Torres Strait Islander Mental Health Committee, The Royal Australian and New Zealand College of Psychiatrists

DELANEY, Sister Elizabeth, General Secretary, National Council of Churches Australia

DODD, Mr Donald, Member, Deerubbin Local Aboriginal Land Council

FLINT, Professor David Edward, National Convener, Australians for Constitutional Monarchy

HEGARTY, Councillor Julie, Board Director, Local Government NSW

HINCHEY, Sister Margaret, RSM, Sisters of Mercy Parramatta

JEEVES, Ms Jessica, Director, Policy, Business in the Community, Business Council of Australia

KILDEA, Dr Paul, Lecturer, UNSW Law; and Director, Referendums Project, Gilbert + Tobin Centre of Public Law

MALEZER, Mr Robert Leslie (Les), Co-Chair, National Congress of Australia's First Peoples

MARTINKOVITS, Mr Jai, Executive Director, Australians for Constitutional Monarchy

MEEHAN, Mr Andrew, National Director, ANTaR

PARKER, Ms Kirstie, Co-Chair, National Congress of Australia's First Peoples

ROSE Mr Michael, Chair, Indigenous Engagement Task Force, Business Council of Australia; Chief Executive Partner, Allens

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SCOTT, Professor Geoffrey, Chief Executive Officer, National Congress of Australia's First Peoples

SYMONDS, Ms Jennifer, Private capacity

WY KANAK, Mr Dominic, Private capacity

**EMERTON, 21 February 2014**

Aunty Merle, Private capacity

BROOKS, Ms Diane, Private capacity

COLLINS, Aunty Shirley, Private capacity

Denise, Private capacity

John, Private capacity

Katy, Private capacity

KENDRICK, Ms, Private capacity

LESLIE, Mr Bob, Private capacity

Man, Private capacity

MARLOW, Ms Lynette, Private capacity

MATTHEWS, Ms, Private capacity

MUNRO, Ms Hyllus, Private capacity

MUNRO, Ms Rachel, Private capacity

NIPPS, Ms Darlene, Private capacity

REID-WELDON, Ms Bev, Private capacity

SIMMS, Uncle Greg, Private capacity

Witness A, Private capacity

Witness B, Private capacity

Woman, Private capacity

WRIGHT, Aunty Winsome, Private capacity

**ADELAIDE, 13 March 2015**

BENWELL, Mr Philip, MBE, National Chairman, Australian Monarchist League

BUTLER, Ms Jade, Reconciliation SA

BYRT, Mr Patrick, Steering Committee Member, Australians for Native Title and Reconciliation South Australia Inc.

CHALMERS, Mr Gordon, Private capacity

COULTHARD, Mr Dwayne, Ambassador, Recognise This

DODD, Mr Garth, Executive Officer, Council of Aboriginal Elders of South Australia Inc.

HAZELBANE, Mr Arrin, Private capacity

LAYTON, Professor Robyn, AO, QC, Co-Chair, Reconciliation SA

LINDSAY, Mr Alan, Member, Law Society of South Australia

PHILLIPS, Dr David, National Director, Family Voice Australia

RATHMAN, Mr Scott, Reconciliation SA

STUBBS, Associate Professor Matthew, Public Law and Policy Research Unit, University of Adelaide

THOMAS, Dr Roger, Private capacity

THOMAS, Ms Khatija, Commissioner for Aboriginal Engagement, Office of the Commissioner for Aboriginal Engagement, South Australia

WATERS, Mr Mark, State Manager, Reconciliation SA

WATERS, Ms Sonia, Director of Aboriginal Services, AnglicareSA

WILLIAMS, Professor John, Dean, Law School, University of Adelaide

WOMERSLEY, Mr Ross, Executive Director, South Australian Council of Social Services

WYLD, Mr Damian, Policy Analyst, Family Voice Australia